79-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-14

In Re:
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,
Petitioner

v.

GENERAL MOTORS CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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AMF Incorporated (AMF) petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 14, 1979.

OPINION BELOW

The opinion of the court of appeals is reported at 591 F.2d 68. A copy of the opinion below is reprinted in the Appendix.

JURISDICTION

The court of appeals entered judgment on February 14, 1979. The court denied a petition for rehearing and

suggestion for rehearing *en banc* on April 18, 1979. (Pet. App. 16a.) On July 11, 1979, Mr. Justice Stevens extended the time to petition for certiorari to and including August 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The court of appeals in this private antitrust case assumed for purposes of decision that defendant automobile manufacturers conspired to boycott AMF's automotive pollution control device. Summary judgment dismissing AMF's complaint was upheld on the sole ground that plaintiff's cause of action arose upon defendants' conspiratorial announcement in August 1964 that they would develop and exclusively use their own emission control system and did not intend to purchase plaintiff's device. Defendants' late 1964 announcement was both prospective and contingent. No purchases were to be made until the Spring of 1965, and, as of late 1964, defendants' emission control system had been neither developed nor approved by state authorities. The critical date for consideration of the applicability of the statute of limitations is January 10, 1965, and the following questions are presented:

1. Whether the ruling below that plaintiff's antitrust cause of action for market exclusion is time-barred because defendants' overt acts subsequent to and in furtherance of their conspiratorially-announced intention to boycott AMF were "but unabated inertial consequences of [their] pre-limitations action" was erroneous and in conflict with the principles governing application of the statute of limitations in cases of continuing conspiracies enunciated by this Court in *Zenith Radio Corp.*

v. Hazeltine Research, Inc., 401 U.S. 321 (1971), and by the courts of appeals in other circuits.

2. Whether AMF could have made the requisite nonspeculative showing of the fact and amount of damages based on defendants' prospective and contingent announcement that they would not purchase AMF's smog control device if they could successfully develop their own system and obtain required state approval, where state law required that all cars sold in the state be equipped with a certified device like plaintiff's whether factory installed or not.

3. Whether this Court's rule disfavoring the use of summary judgment in antitrust cases prohibits summary disposition of disputed issues concerning the application of the statute of limitations where the jury could have found either (a) that plaintiff continued its efforts to enter the market during the limitations period but was rebuffed by defendants' continued conspiratorial acts; or, (b) that market contingencies rendered the fact and amount of damages resulting from pre-limitations conduct speculative and unascertainable prior to the critical statute of limitations date.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . .

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides in pertinent part:

Any action to enforce any cause of action under Sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued . . . .

STATEMENT

1. The Facts:

This is a private antitrust suit alleging a conspiracy by defendant automobile manufacturers and their trade association to boycott AMF's automotive pollution control device and to exclude it from the market for such equipment, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In 1960, in an effort to deal with the problem of automotive pollution, the California Legislature established the Motor Vehicle Pollution Control Board ("MVPCB" or "Board") and authorized it to issue "Certificates of Approval" for those exhaust pollution control devices found capable of reducing hydrocarbon (HC) and carbon monoxide (CO) emissions to designated standards.[1] The statute as applied provided that beginning with the first model year twelve months or more after the MVPCB had certified two or more devices, every new car registered in the State of California would have to be equipped with a certified device.

Recognizing the potential market for exhaust control devices created by the California statute (and the prospect of similar legislation in other states and nationally), AMF in 1961 entered into a program for the development of an after-burner design for controlling HC and CO in automotive exhaust. Prototypes of the AMF device were

[1] 1960 Cal. Stats. 1st Ex. Sess., C.23 and CAL. HEALTH & SAFETY, C.3, § 24,383, § 24,386.

placed in the state testing program in California and submitted to the MVPCB for certification.

Meanwhile, defendants and co-conspirators—the major domestic automobile manufacturers and their trade association (the AMA)—had entered in a "cooperative" program, features of which involved joint testing of "outside" technology and execution of a Cross-Licensing Agreement. The purpose of this program was to delay the installation of emission controls, which enhance neither automotive performance nor styling, and to place the development and marketing of pollution control devices "on a non-competitive basis" if and when emission controls became mandatory (R. 4700-01).

Defendants learned in late 1963 that the MVPCB was "very confident" of approving exhaust control devices manufactured by AMF and others in sufficient time to require their use as early as the 1966 model year. (R. 4924.) Pursuant to their plan to delay the use of exhaust control devices as long as possible, defendants in 1964 adopted a resolution that they would comply with the California exhaust standards "*starting with* 1967 models" (R. 4942, emphasis added) and publicly announced their joint decision only to "make use of developments evolved through the industry cooperative program" (R. 4950-51). That announcement was designed to chill the interests of third-party device manufacturers such as AMF (R. 4945; R. 4958). Those manufacturers, however, continued development efforts, which culminated in the certification by the State of California on June 17, 1964 of the AMF Smog Burner and three other third-party devices. This meant that it would be unlawful to register a new 1966 passenger vehicle in California unless it was equipped with one of these certified devices.

Following AMF's certification, the defendants assured each other that no one would "break ranks" from the 1967 model year agreement and factory install any of the recently-certified devices. (R. 5037, and *see* R. 6091; R. 5172; R. 6173-74.) Nevertheless, defendants were confronted with a dilemma. Since they knew AMF would tool up for a one-year market (R. 5457-58), defendants had to choose among the following courses: (1) install the less expensive, more effective AMF device at the factory, (2) allow the AMF unit to be installed locally in California (a contingency for which AMF was planning), or (3) promptly try to develop their own "solution" by model year 1966 (*i.e.*, the fall of 1965). While defendants had repeatedly sworn that the last alternative was absolutely impossible (R. 5166), this was the course jointly chosen and announced—even though in mid-1964 no industry device (except Chrysler's) was even in the prototype certification stage. (*See* Barr Dep. Def. Ex. 33; R. 5196-97; Sherman Dep. 1380-82, R. 6086-87; Berry Dep. 110-111, R. 6028-29.)

Pursuant to this agreement, defendants announced at the August 12, 1964 MVPCB meeting that they were going to advance installation of industry systems from 1967 to 1966 models, thereby avoiding the requirement to use the AMF Smog Burner or other certified devices. (*See* R. 4305; R. 5258.) Finally, although there was virtually no cost data for the undeveloped and uncertified industry "air injection system," defendants publicly represented that their system would have a selling price to the public no greater than that of the least costly certified device, the AMF Smog Burner (R. 5393-95).

Throughout the Fall and Winter of 1964, the industry's "air injection system" remained in a rudimentary state of development, and, as defendant American Motors

admitted, as late as October 1964, "certification was not a foregone conclusion, at least for GM, Ford and American Motors" (AMC Reply at 18, R. 4452).

In fact, for some vehicles, defendants did not even try to utilize the industry system, but instead sought exemptions from the MVPCB. Board regulations required, however, that defendants submit proof of non-availability of certified devices in support of requests for exemptions. Therefore, the use of Smog Burner or other outside devices on *any* vehicle would compromise all exemption requests. (*See* R. 4995-96.) To meet the non-availability criterion, GM falsely represented in its request for exemptions that certified devices would require extensive body changes in certain vehicles and hence were not "available" (R. 5234-35). While this representation was false, it was successful. On January 20, 1965, after GM defended its exemption requests before the Board (Steinhagen to Barr, 1/25/65), all exemption requests were granted (Searing Dep. Ex. P-28; R. 5828).

Nevertheless, recognizing the potential preference for its device over defendants' costly and less effective system, AMF continued its efforts to market the Smog Burner throughout the first half of 1965.[2] Thus, AMF made test installations of prototype Smog Burners on a variety of foreign models throughout the Winter and Spring of 1965 (Ulyate Aff. ¶ 11). Defendants, however, induced these foreign manufacturers to sign the Cross-Licensing Agreement in June, 1965, precisely at the time AMF was trying to sell them its device.

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[2] Depositions of Gott at 41-42, 76; Lipchik at 195-202; Davis at 22; Ulyate at 305-06; Cotta at 6; Keen at 6; Seltzer at 8; Green at 15; Williamson at 5.

Further, in February of 1965, AMF unconditionally quoted International Harvester, a named co-conspirator, a firm price of "$55 per Smog Burner" for 7,000 units, further stating that the price would be considerably less if "volume production" were achieved.[3] On April 8, 1965, AMF called on Ford and again offered to supply this defendant the Smog Burner (R. 5831). Ford rejected the offer even though at that time it appeared questionable whether Ford could qualify its fleet under the state program. (*See* R. 5776-77; R. 5712; R. 5569; Homfeld Dep. at 132, R. 6103.)

Thus, in the Spring of 1965, within the limitations period, the AMF Smog Burner project was still very much alive, and AMF was continuing preparations for ultimate market entry. For example, in the event defendants failed to achieve certification of their own devices, but refused to factory install plaintiff's units, AMF had detailed alternative plans for installing Smog Burners at dealer and other locations within the State of California.[4] On April 21, 1965, a substantial appropriation was approved by AMF management to maintain the Smog Burner project "for the second quarter of 1965" (R. 5832).

In the meantime, during the Fall of 1964 and the Winter of 1965, defendants continued with their efforts to develop their own pollution control system and to

[3](R. 5829). On March 26, 1965, AMF wrote to International Harvester again confirming that the February price was a "firm quotation" based on "your request for quotation." (Lipchik to Bail, 3/26/65).

[4]*See* Seltzer Dep. at 166-68; Lipchik Dep. at 142-43; AMF Progress Report-Smog Burner, 8/12/64, AMF 1302A.

obtain the required state certification. These efforts included development of the Saginaw air pump which was jointly financed by GM, Ford and AMC and the uniform announcement by the same three companies in July of 1965 of below-cost prices that were specifically aimed at matching AMF's price.[5] Thus, these defendants represented to the Board in July, 1965 that the price of their devices would be "no more than $50" to the car buyer (Misch Dep. at 551), even though they knew that such a price would lead to very substantial losses.[6] As a direct result of their on-going joint development and testing activities and this below-cost pricing, defendant's system was certified in July of 1965. The August 1964 boycott decision was thereby finally effectuated, and AMF excluded from the market.

2. Proceedings Below:

The district court, on the eve of trial, granted summary judgment from the bench. No opinion was rendered and the court adopted defendants' lengthy proposed findings virtually verbatim. The court based summary judgment principally on its "findings" that defendants' rejections of AMF were unilateral, that there was no AMF device to boycott since it was only a prototype, and that the action was barred by the statute of limitations.

The court of appeals upheld summary judgment on the sole ground that the four-year statute of limitations barred suit, 15 U.S.C. § 15b. The court of appeals

[5]*See* R. 5394; Mtg. of Ford Prod. Planning Comm., 5/11/65, Secrest Dep. Exs.

[6]Ford, for example, lost in excess of 4 million dollars on its device in model year 1966 alone. GM lost 6.8 million dollars on its device for that year. (*See* R. 4318-19.)

determined that January 10, 1965, was the critical date for its statute of limitations analysis (Pet. App. 6a).[7] It first considered whether defendants had committed overt acts in furtherance of their conspiracy after January 10, 1965 which damaged AMF, in which case a cause of action based on those acts would not be barred. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). The court "found," however, that "the undisputed record indicates that appellees' decision not to purchase the afterburner devices from AMF were final prior to January 10, 1965" and that "AMF's exclusion from the afterburner market was complete prior to January 10, 1965" (Pet. App. 8a). The court characterized AMF's efforts to sell to Ford and its co-conspirator International Harvester as "forlorn inquiries by one all of whose reasonable hopes had been previously dashed." (*Id.* at 10a.) Since, in the court's view, "the 1964 decisions, as to AMF, were irrevocable, immutable, permanent and final," any "[a]cts subsequent to January 10, 1965 . . . were 'but unabated inertial consequences of some pre-limitation action'" and were not acts giving rise to a cause of action. (*Id.* at 11a, *quoting Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).)

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[7] January 10, 1965 is the critical date for purposes of the statute of limitations because four years after that date, on January 10, 1969, the United States filed a suit involving the same subject matter. Thus, pursuant to the provisions of Section 5 of the Clayton Act, 15 U.S.C. §16, the running of the statute in the present case was tolled until October 29, 1970, one year following conclusion of the Government's case by a consent decree entered on October 29, 1969. *See* United States v. Automobile Mfrs. Ass'n, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* New York v. United States, 397 U.S. 248 (1970). The present complaint was filed on October 23, 1970.

The second issue addressed by the court was whether, as of January 10, 1965, the fact or amount of AMF's damages was speculative or unprovable. *See Zenith Radio*, 401 U.S. at 339. On this issue, the court ruled that AMF had been finally and completely injured by defendants' August 1964 announcement that they intended uniformly to adopt the industry's emission control system and would not use AMF's device (Pet. App. 14a-15a). It concluded that since the *entire* population of 1966 California automobiles could have been projected at any time between August 1964 and January 10, 1965, plaintiff's damages were not more speculative then than they would be today. (*Id.*) In so holding, the court has ignored fundamental market contingencies and uncertainties which made it impossible for AMF to know, prior to January 10, 1965, whether it would suffer total, partial or no exclusion from the automotive pollution device market.

REASONS FOR GRANTING THE WRIT

This case raises issues of general importance concerning application of the statute of limitations and the use of summary judgment in antitrust cases:

First. The court of appeals has held AMF's cause of action barred by the statute of limitations on the curious and erroneous ground that continuing overt acts set in motion by defendants' pre-limitations boycott decision were "but unabated inertial consequences of" that decision (Pet. App. 11a). The rule announced below is erroneous and, if followed in other circuits, would unduly restrict private antitrust enforcement. It is, moreover, in direct conflict with this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S.

321 (1971), and with leading decisions of the Third, Fifth and Tenth Circuits.[8]

Second. The court of appeals improperly applied the *Zenith* rule that an antitrust cause of action does not accrue until the fact and amount of damages are reasonably ascertainable. Specifically, it held that AMF's cause of action accrued when defendants *announced* their intention to boycott the AMF device, even though that announcement was both prospective and contingent. Contrary to the ruling of the court below, it would have been impossible as of January 10, 1965, for AMF to know whether it would ultimately suffer complete, partial or no exclusion from the state-mandated market for exhaust control devices. In those circumstances, an ability to project the *entire* California automobile market, on which the court of appeals rests its decision, is irrelevant. The decision below is both incorrect and in conflict with decisions in other circuits that have correctly applied the *Zenith* rule in cases where, as here, the impact of an antitrust violation can be affected by future and unknowable actions, decisions or market developments. *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); and *see Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 138-39 (3d Cir. 1978); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768, 770 (3d Cir. 1972).

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[8] Fitzgerald v. General Dairies, Inc., 590 F.2d 874 (10th Cir. 1979); Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127 (3d Cir. 1978); Imperial Point Collonades Condominium v. Mangurian, 549 F.2d 1029 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1978); Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). *See also* Berkey Photo, Inc. v. Eastman Kodak Co., [1979] TRADE REG. REP. (CCH) ¶ 62,718 at 78,020-21 (2d Cir. 1979); Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 572-73 (4th Cir. 1976).

Third. The Court of Appeals resolved highly contested fact issues against AMF, thereby flouting this Court's decisions in *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962), and *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700 (1969). For example, it improperly found that "AMF itself was convinced by the last quarter of 1964 that it was out of the market" (Pet. App. 11a), despite clear evidence that AMF made firm offers and contemplated "volume production" in February 1965 and remained active in the market until at least mid-1965 (*see* p. 7-8 *supra*).

Review by this Court is necessary to correct the manifest errors below: to eliminate the lack of uniformity among circuits in the interpretation and application of both the continuing conspiracy and nonascertainability aspects of *Zenith*; and, finally, to make clear to all courts in the federal system that there is a right to have a jury determination of disputed fact questions raised by defenses under the statute of limitations.

1. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 328 (1971), this Court affirmed that each injurious act of a continuing conspiracy gives rise to a new cause of action. Thus, even though a conspiracy is formed and some overt acts are committed more than four years before suit, an action is not barred based on additional injurious acts that occur in the four-year period preceding suit.

Relying heavily on *Zenith*, the Court of Appeals for the Fifth Circuit has taken the lead in establishing the rule, of great significance in applying the statute of limitations, that "continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action." *Poster*

Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

At the same time, the Fifth Circuit has recognized that there are more likely to be continually accruing causes of action in refusal to deal or market exclusion cases than in other types of antitrust violations. This is because exclusion from an industry "while perhaps unequivocal . . . [is] not of necessity permanent." *Poster Exchange*, 517 F.2d at 127. Consequently, any "act or word" perpetuating plaintiff's exclusion (*id.* at 128) or any "reiteration of defendants' refusal to deal" gives rise to a new antitrust cause of action. *Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1978).

The significance of post-*Zenith* case law establishing that new causes of action accrue based on continuing injurious conduct is clear. Defendants' 1964 boycott announcement was not self-executing. It related to the future procurement and installation of smog control devices, and the success of the conspiracy required substantial implementing conduct within the limitations period. Nevertheless, the court of appeals has held AMF's claim to be time-barred. In doing so it has announced a rule of law that is erroneous on its face and in conflict with the decisions of the Fifth and other circuits interpreting *Zenith*.

The error of the court below stemmed from a complete misreading of the opinion in *Poster Exchange*. In that case, the Fifth Circuit established as a logical and proper *caveat* to the rule concerning continually accruing rights of action that damages which occur within the four years preceding suit, but which are solely the "abatable but

unabated inertial consequences of some pre-limitations action" are barred by the statute of limitations. *Poster Exchange*, 517 F.2d at 128. As the Fifth Circuit later explained in *Mangurian*, "no new cause of action accrues for the damages occurring within the limitations period *because no act committed by the defendant within that period caused them.*" *Mangurian*, 549 F.2d at 1035 (court's emphasis).[9] The key distinction is between injurious conduct or acts occurring within the limitations period and the mere accumulation of increased damages which "result *solely* from [pre-limitations] acts." *Id.* (emphasis added.)

The court of appeals has egregiously misinterpreted the language in *Poster Exchange* to mean that overt acts occurring within the limitations period which continued an established pre-limitations course of illegal conduct do not give rise to a new cause of action. The court recognized that within the limitations period, defendants engaged in numerous overt acts, including additional refusals to deal with AMF, predatory pricing announcements aimed specifically at foreclosing utilization of the AMF device, and a series of acts designed to achieve

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[9] A second qualification or *caveat* recognized by the Fifth Circuit in *Poster Exchange* and *Mangurian* is that where an "actionable wrong is by its nature permanent at initiation without further acts" suit must be brought within four years of the occurrence of the act (*Poster Exchange*, 517 F.2d at 126-27). As discussed below (pp. 19-21), the court of appeals committee grave error by resolving highly-disputed fact questions relevant to this issue against plaintiff. For example, the court found that AMF already had been driven out of the control device business by the end of 1964, and thus could not have suffered injury as a result of additional overt acts by defendants in 1965, although many of these acts were specifically directed against AMF, which was continuing its attempts to enter the market.

certification of their own "industry" device (Pet. App. 5a, 6a, 9a). Without these additional overt acts, defendants could have been compelled to deal with plaintiff by force of the California law requiring use of a certified device on 1966 models (Pet. App. 4a). Inexplicably, however, the court held that defendants' "[a]cts subsequent to January 10, 1965, . . . were but 'unabated inertial consequences of some pre-limitations action'" (Pet. App. 11a), specifically, defendants' "1964 rejection of the Smog Burner" from which, in the court's erroneous understanding, "all injury to AMF necessarily resulted. . . ." (*Id.*)

Contrary to the court's holding, "acts" subsequent to and in implementation of defendants' 1964 decision do constitute injurious conduct within the limitations period. It is clear, moreover, that the acts occurring within the limitations period were not "inconsequential," "inertial," or "tangential." Rather they were affirmatively directed against AMF and were actively undertaken to assure success of the conspiracy. These acts included: (a) predatory below-cost pricing in July of 1965, specifically aimed at foreclosing AMF's device from the market; (b) false representations to the MVPCB that use of plaintiff's device would require extensive body changes, thus rendering AMF's product "unavailable" for models for which the industry sought exemption; (c) joint development of an air pump which was vital to certification of the industry's device; (d) continued enforcement of the Cross-Licensing Agreement, including inducement of foreign manufacturers to join the Agreement at a time when AMF was trying to sell its device to them. (*See* pp. 7-9 *supra.*)

In short, the court below failed to understand that plaintiff's exclusion from the market was not complete until the occurrence of additional overt acts well within the limitations period. *See Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F.Supp. 176, 181 (E.D. Pa. 1976), *appeal*

dismissed without opinion (3d Cir. 1977), *cert. denied*, 435 U.S. 970 (1978). The case thus stands as a dangerous precedent for the immunization of anticompetitive acts committed in the course of a continuing conspiracy. This Court should make clear that continued conduct which violates the antitrust laws by excluding a competitor from a market will subject the antitrust violator to continued antitrust liability.

2. In *Zenith*, this Court held that the statute of limitations does not begin to run until the damages from a conspiratorial overt act are actually suffered and are reasonably ascertainable (401 U.S. at 339-42). In *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972), the Second Circuit held that where plaintiff Louisville, a distributor of a chemical product (MH-30), was terminated by its supplier for failure to go along with certain illegal programs, a suit filed more than four years later was not barred since plaintiff would have been unable to prove its damages with sufficient certainty until a later point in time within the limitations period. (*Id.* at 885.) This was because "Louisville had no means of knowing [at the time of its termination] to what extent it would be able to fill its requirements of MH-30 from other distributors or at what price." (*Id.*) In short, the extent of Louisville's exclusion from access to supplies, and hence the amount of its damages, could not have been determined at the time of defendants' last overt act pursuant to the conspiracy. *See Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3d Cir. 1978); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768, 770 (3d Cir. 1972).

The court of appeals in the instant case failed to recognize that precisely the same type of market con-

tingencies and uncertainties precluded suit by AMF in 1964. Rather, it reasoned that, based on defendants' announcement in 1964 of their "*intention* not to use the Smog Burner," a cause of action for *absolute exclusion* from future markets could have been brought by AMF (Pet. App. 14a, emphasis added).

Notwithstanding defendants' announced intention in late 1964, and their expressed preference for an industry solution to the requirement for exhaust control devices, it is undisputed that defendants had no alternative to the AMF Smog Burner until mid-1965. Thus, defendants have admitted that the 1964 boycott decision was contingent upon obtaining certification of their own devices (Heinan Dep. at 1374, R. 6083). *See also* AMC Reply at 18, R. 4452. Moreover, even if some or all of defendants persisted in refusing to factory-install the AMF device, the possibility remained in 1964 that the State of California would require in-state installation, a contingency for which AMF was planning. (*See* p. 8 *supra.*). Further, defendants' exemption requests were not acted upon until January 20, 1965. Clearly, in these circumstances, AMF could not have asked a jury to speculate in 1964 that it would be excluded absolutely from the state-mandated market for control devices and would have been able to make no sales whatsoever in 1965 or future years. *See Ansul,* 448 F.2d at 885. It can be taken as certain that defendants would have contended that a claim of "absolute exclusion" was premature because GM, Ford and AMC did not have certified devices in hand and they were only in a rudimentary state of development. (*See id.*) Thus, in 1964, plaintiff "had no means of knowing to what extent" it might be called upon to supply exhaust control devices

in California. (*Id.*)[10] Review by this Court is required to clarify the rule in *Zenith* and to harmonize its application by the courts of appeals.

3. In *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962), and *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 704 (1969), this Court cautioned that "summary procedures should be used sparingly in complex antitrust litigation. . . ." Moreover, in any case it is axiomatic that summary judgment can be granted only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

These standards are fully applicable to summary dispositions of antitrust cases on the ground they are time-barred by the statute of limitations. Thus, in *Fitzgerald v. General Dairies, Inc.,* 590 F.2d 874 (10th Cir. 1979), the court of appeals held that where plaintiff alleged it was unlawfully excluded from the dairy business by the actions of defendants, the facts that plaintiff "felt there was a cause of action for antitrust violations" and that "a bankruptcy petition was filed before the four-year period of limitations" did not support summary judgment that the cause was time-barred. (*Id.* at 875.) Summary judgment was reversed for many of the reasons

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[10] By contrast, in the cases relied upon by the court of appeals there existed no market contingencies or uncertainties of any kind. In all of the cases cited, both injury and damages were final, complete and ascertainable upon occurrence of the challenged acts and practices. *See* City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), *cert. denied,* 99 S.Ct. 1033 (1979); Charlotte Telecaster, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570 (4th Cir. 1976); Monona Shores, Inc. v. United States Steel Corp., 374 F.Supp. 930 (D. Minn. 1973).

argued here by petitioner. Thus, the court of appeals held that numerous fact questions were raised, including plaintiff's efforts to re-enter the market following bankruptcy and allegations of further overt acts by defendants preventing such re-entry within the four-year period, all of which should be resolved by the trier of facts and not by the court on summary judgment. *Id.* at 875-76. *See Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 138-39 & n.41 (3d Cir. 1978).

In the present case, however, the court of appeals arrogantly substituted its judgment for that of the jury on numerous critical fact questions including: (a) whether the conspiracy to exclude AMF continued into the limitations period; (b) whether AMF continued its attempts to enter the market, and (c) at what point AMF's damages ceased to remain speculative and contingent.

Repeatedly resolving disputed fact issues against plaintiff, the court made its own "finding" that "[n]othing [existed] in the record indicates other than that the 1964 decisions, as to AMF, were irrevocable, immutable, permanent and final" (Pet. App. 11a). The court simply ignored substantial evidence that defendants' original 1964 boycott decision was contingent upon certification of the industry system and that defendants themselves did not deem the 1964 announcement a knock-out blow, since they engaged in costly below-cost selling in 1965 to foreclose plaintiff and since they continued to refuse to deal with plaintiff well into the limitations period.[11]

[11] The court of appeals cites "lead time" requirements as one reason why defendant's 1964 decisions were "irrevocable" (Pet. App. ___). To the contrary, as of January 10, 1965 AMF's Smog

[footnote continued]

The court's treatment of plaintiff's continued efforts to sell its product in 1965 vividly demonstrates the inappropriateness of summary judgment. AMF quoted a firm price for the Smog Burner to International Harvester, a named co-conspirator, in February, 1965, and tried to sell the product to Ford two months later (p. 8 *supra*). The court of appeals cavalierly dismissed these events by stating, incorrectly, that the International Harvester quote "did not indicate production capability" (Pet. App. 5a) and by characterizing both offers as "forlorn inquiries by one all of whose reasonable hopes had been previously dashed" (*id.* 10a). Clearly, however, such questions as whether these inquiries were "forlorn," whether plaintiff's reasonable hopes and expectations already were dashed, and whether plaintiff had the ability to deliver the goods as stated to International Harvester are all matters which plaintiff is entitled to have resolved by a jury.[12]

Burner was in a far more advanced state of development than the uncertified industry air injection system and AMF had the capability to quickly launch production in the event orders were received. (*E.g.*, Lipchik Dep. at 26, 137, 139-49; AMF Progress Report at 11 (AMF 1302A); AMF Distribution Plan and Cost Estimate at 8, 10, 25, App. G., MVPCB Final Staff Report, Lipchik Dep. Ex. 13.) Moreover, nothing precluded purchase of the Smog Burner for the mid-1966 or even 1967 model years.

[12] The issue of whether AMF's damages were ascertainable prior to the limitations period also turns on many of the same fact issues discussed above, such as the contingent nature of defendants' 1964 refusals and the continued vitality of the Smog Burner project throughout the first half of 1965. These disputed issues of fact should not have been resolved against plaintiff on summary judgment. *See* Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 138-39 & n.41 (3d Cir. 1978); Continental-Wirt Electronics Corp. v. Lancaster Glass Corp., 459 F.2d 768, 770 (3d Cir. 1972).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 16, 1979

APPENDIX.

APPENDIX

In re
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF, INCORPORATED
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Ford Motor Company, Chrysler Corporation,
American Motors Corporation and
Automobile Manufacturers Association, Inc.,
Defendants-Appellees.

No. 76-1648

United States Court of Appeals, Ninth Circuit

Feb. 14, 1979

Howard Adler (argued), Bergson, Borkland, Margolis & Adler, Washington, D.C., for plaintiff-appellant.

James G. Hunter, Jr. (argued), Hedland, Hunter & Lynch, Chicago, Ill., Philip K. Verleger (argued), of McCutchen, Black, Verleger & Shea, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before SNEED and HUG, Circuit Judges, and EAST,* District Judge.

SNEED, Circuit Judge:

This is an appeal from summary judgments in a treble damage antitrust action brought by appellant AMF, Incorporated ("AMF") against appellees, four major American automobile manufacturers and their trade association. AMF claims that appellees, acting in concert, by agreeing not to purchase AMF's device, excluded it from the early market in methods to limit and control air pollution, and that such action caused commercial injury cognizable under Section 4 of the Clayton Act, 15 U.S.C. § 15. Following the close of discovery, appellees moved for summary judgment contending that (1) the industry's rejection of the AMF device was strictly the result of unilateral decisions by each automobile company; (2)

*Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

there never was an AMF device to boycott because only a prototype had been certified by the California Motor Vehicle Pollution Control Board ("MVPCB"); (3) AMF's action was barred by the statute of limitations; and (4) AMF had transferred relevant documents to another company or lost them when it terminated its exhaust control device business. Appellee Chrysler moved separately for summary judgment on the added ground that it had at all times been firmly committed to its own device. The district court granted the appellees' motions for summary judgment with respect to all issues relevant to this appeal. As we agree that the four-year statute of limitations in 15 U.S.C. § 15b barred this action, we affirm without reaching the district court's other grounds.

I.

FACTS

AMF commenced this action on October 23, 1970, charging that appellees conspired to restrain trade and monopolized in violation of Sections 1 and 2 of the Sherman Act. The roots of this alleged conspiracy extend back to the early 1950's, when appellees entered into a cooperative program to study and remedy problems generated by emissions from internal combustion engines. One part of the joint program included a cross-licensing agreement for patents developed by any party. AMF further alleges that within this overall conspiracy appellees, in 1964, formed a conspiracy specifically intended to exclude it from the developing market for automobile emission control equipment.

In 1961 AMF entered into a program to develop an afterburner designed by Charles Morris; AMF termed its device the "Smog Burner." Afterburners reduce

emissions by further combustion of exhaust gasses. They are "hang on" devices, in that they are attached toward the end of the exhaust system, and are not integral parts of the engine itself. Although various appellees had experimented with afterburner devices, none was concentrating its own internal development upon such a device in 1964. At that time no state or federal agency mandated particular emission control standards. Under California law, however, the MVPCB was authorized to issue "Certificates of Approval" to pollution control devices found capable of achieving certain standards. The law specified that as soon as the MVPCB certified two such devices, a provision requiring all new automobiles sold within the state to meet established emission requirements would become effective. AMF submitted a prototype of its device to the MVPCB, and on June 17, 1964, the MVPCB certified AMF's prototype along with three other emissions control methods, none of which were afterburners. At that time, no appellee had a device that had received certification. Nevertheless, as of June 17, 1964, California law required appellees to seek exemptions or meet the established emission requirements in the 1966 model year, which commenced in the Fall of 1965.

AMF cites several actions on the part of appellees which indicated a joint decision to exclude parties outside of the industry cooperative program from the market in these devices. Specifically, after concerted discussion, appellees each announced at an August 12, 1964 MVPCB meeting that they would install industry-developed emission control systems in 1966 models and would refrain from using AMF's Smog Burner or any of the other previously certified devices. At various times each appellee directly contacted AMF to this effect,

the last such refusal coming from American Motors in October. According to an internal AMF memorandum dated October 29, 1964, AMF was unable to get any appellee to consider the Smog Burner even for vehicles for which exemption from the California requirements was requested. In October when American Motors Corporation, after testing of the AMF device, stated that it would not use the Smog Burner, AMF personnel had concluded that a conspiracy to exclude them existed.

In November the MVPCB denied certification for use on used cars to the only device, other than AMF's, that had applied for such certification, with the consequence that California's provisions requiring the installation on used cars did not go into effect. By December, AMF had begun to decrease its staff working on the Smog Burner project. AMF had foreseen two possible markets for the device—new and used cars—and neither had developed. On January 7, 1965, the MVPCB met to consider exemption requests by appellees for certain models; AMF did not attend. AMF did not send a representative because, as its management stated, it had a "conviction that no purchase orders for Smog Burners would emanate from any Detroit manufacturer." An AMF representative contacted two Ford engineers in April of 1965, asking whether Ford had any new interest in the Smog Burner; he received a negative response. Finally, a letter to International Harvester, not named as a defendant in AMF's suit, sent in February 1965 quoted prices of the device, but did not indicate production capability.

During this period, each of the appellees worked on an emission control system for its cars. Chrysler developed its own "Clean Air Package" (CAP), and the other three manufacturers adopted an air injection system operated with an air pump supplied by GM. Each of the appellees

did some testing with the AMF prototype during the Summer of 1964, but only AMC ever tested a production model. Chrysler's CAP system was certified in November 1964, but none of the other three manufacturers received certification or exemption until the Spring of 1965.

II.

LIMITATIONS

Appellant filed this suit on October 23, 1970. 15 U.S.C. § 15b establishes the applicable limitations: "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years *after the cause of action accrued*" (emphasis added). The government commenced a civil suit against these same appellees, however, on January 10, 1969. 15 U.S.C. § 16(b) suspends the running of the statute of limitations for "every private right of action . . . based in whole or in part on any matter complained of" in the private action during the pendency of and for one year after any antitrust action commenced by the United States. The government suit was settled by consent decree October 29, 1969, within one year of AMF's filing this suit. We therefore focus our attention on January 10, 1965, four years prior to the commencement of the government action, as the critical date for limitations purposes.[1] If appellant's action had accrued before that date, this action is barred by 15 U.S.C. § 15b.

[1] Appellees have argued that the government suit did not toll limitations because it was not "based in whole or in part on the matter complained" of in the suit by AMF. In light of our conclusion that limitations bars this suit even if 15 U.S.C. § 16(b) applies, we do not reach this question.

Previously, we have stated: "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975). Under two possible theories, AMF's cause of action arose on January 10, 1965 or thereafter. First, if appellees committed overt acts which damaged AMF, in furtherance of a conspiracy, on January 10, 1965 or thereafter, those acts are not barred. Second, if damages attributable to appellees' actions prior to January 10, 1965, were speculative, or their amount and nature were unprovable, as of that date, then AMF's action to recover those damages is not barred. We treat each of these possibilities in turn.

A. Continuing Conspiracy

It is well established that a plaintiff's cause of action for damages under the antitrust laws is not barred simply because a conspiracy was formed outside the limitations period. The Supreme Court clarified the point at which an antitrust cause of action accrues in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . This much is plain from the treble-damage statute itself. 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

401 U.S. at 338, 91 S.Ct. at 806.

Cf. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) (damages not barred by limitations may be recovered in suit brought in 1955 for injury caused by prohibited practice begun in 1912 and continued through date of suit). AMF can recover only for damages *caused* by forbidden "overt acts" of the conspirators within the limitations period. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied*, 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951). In this case we find the undisputed record indicates that appellees' decisions not to purchase the afterburner devices from AMF were final prior to January 10, 1965. AMF's exclusion from the afterburner market was complete prior to January 10, 1965. No forbidden "overt acts" occurred thereafter; appellees merely supplied their needs from sources other than AMF. AMF's position resembles that of a disappointed patron of the theater. When turned away from the theater at eight o'clock because the performance is sold out, his exclusion occurs at eight, not during the performance or when it concludes at eleven o'clock. *Pari ratione*, AMF's cause of action arose before January 10, 1965 and is barred by 15 U.S.C. § 15b.

AMF argues, however, that appellees' rejection of its device prior to January 10, 1965 was not a final rejection. To continue the theater example, it argues that it was not irrevocably excluded at eight o'clock but rather was told to call again just before curtain time at eight-thirty. Exclusion, therefore, could not be final until eight-thirty. Specifically, it argues that under *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957), the refusal to

deal was not final, and that each day without an order constituted a new cause of action. To support this view, AMF points to asserted new refusal by Ford and International Harvester in early 1965 as forbidden "overt acts" of the continuing conspiracy. It also argues that pricing announcements and other activity by appellees to achieve certification of their methods constituted similar acts.

We note to begin with that *Flintkote* was concerned with the period of time for which damages were recoverable, not the period of time within which suit must be brought. It limited damages suffered from a continued refusal to deal to those prior to the filing of suit. Recompense for wrongful acts subsequent to the suit must be sought in later suits. Here the question is whether AMF's injury was the consequence of multiple wrongs or a single irrevocable and permanent injury. If the injury was final during 1964, then the purpose of 15 U.S.C. § 15b as a statute of repose should be served. *See Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867 (9th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978). This purpose has been described as follows: "The function of the limitations statute is simply to pull the blanket of peace over acts and events which have themselves already slept for the statutory period, thus barring proof of wrongs imbedded in time-passed events." *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 127 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 784, 46 L.Ed.2d 643 (1976).

In *Poster Exchange, supra*, the Fifth Circuit clearly distinguished between injury final at its inception and a continuing wrong. A conspiracy had excluded Poster Exchange from access to supplies for a period stretching beyond the four-year limitations period. The court,

unable to determine whether during the limitations period there was "a mere absence of dealing, or whether there was some specific act or word" of a wrongful nature, remanded for a determination of whether such acts or words occurred within the period. 517 F.2d at 128. Nevertheless, the court recognized:

> Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.

Id. at 126-27.

The Fifth Circuit recently adhered to this principle when it observed: "[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff.*" *Imperial Point Colonnades Condominium, Inc. v. Mangurian,* 549 F.2d 1029, 1035 (5th Cir.), *cert. denied,* 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132 (1977) (emphasis original).

These views support our disposition of this case. Any injury to AMF is attributable to the final denials by the appellees in 1964. Contacts initiated by AMF to Ford and International Harvester do not indicate otherwise. These, to continue the theater example, were not invited pre-curtain calls at the box office; rather they were forlorn inquiries by one all of whose reasonable hopes had been previously dashed. That is, appellees had indicated clearly and irrevocably an intent to look to their own devices or modifications thereof for the 1966 model year. The original equipment supply market to

automobile manufacturers differs substantially from other supplier relationships. Any part must be integrated into the full car design. Planning is essential, and planning requires lead time. In this case, the record indicates AMF itself was convinced by the last quarter of 1964 that it was out of the market. By that time, AMF had even failed to gain access to the used car market. The staff for the Smog Burner was substantially disassembled in December 1964. AMF failed to have a representative attend a January 7, 1965 MVPCB meeting in part because it believed appellees would not order from it. Whatever hope of business AMF may have clutched, its source could not have been actions or words of the appellees. Nothing in the record indicates other than that the 1964 decisions, as to AMF, were irrevocable, immutable, permanent and final. For this reason, all injury to AMF necessarily resulted from the 1964 rejection of the Smog Burner. Acts subsequent to January 10, 1965, to use the language of *Poster Exchange,* were "but unabated inertial consequences of some pre-limitations action." 517 F.2d at 128.

B. Speculative Damages

Turning to AMF's second ground for avoiding the bar of limitations, we acknowledge that the Supreme Court has recognized in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77, that an accrual of damages can constitute the accrual of a cause of action even though all wrongful acts took place outside the limitations period:

> [E]ven if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the

fact of their accrual is speculative or their amount and nature unprovable.

> . . . [R]efusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered . . . .

401 U.S. at 339, 91 S.Ct. at 806 (citations omitted).

This court interpreting *Zenith*, has stated:

> *Zenith* stands for the proposition that a plaintiff may recover for acts violative of the antitrust laws committed prior to the statute of limitations date, but that he may only recover those damages for such acts which accrued and became ascertainable within the period of the statute.

Hanson v. Shell Oil Co., 541 F.2d 1352, 1361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977). Applying this standard, AMF could maintain this action if, as of January 10, 1965, its damages were speculative, or their amount and nature were unprovable.

Zenith did not establish new standards for determining whether damages are ascertainable as of a particular date.

> The principal cases explaining the criteria for ascertaining whether damages are speculative remain *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946), and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66, 51 S.Ct. 248, 75 L.Ed. 544 (1931). These cases teach that when the defendant's wrong has been proven, "the jury may make a just and reasonable estimate of the damage . . . . '[J]uries are allowed to act upon probable and inferential, as well as direct and positive proof.'" 327 U.S. at 264, 66 S.Ct. [574] at 580.

Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 573 (4th Cir. 1976).

In *Bigelow* and *Story Parchment Co.* the Court faced the question whether damages were too uncertain for a jury to award damages. It is distinguished uncertain *damage*, which prevented recovery, from an uncertain *extent* of damage, which did not prevent recovery; that is, the failure to establish an injury, from the not uncommon imprecision with regard to its scope. The Court emphasized that a wrongdoer should not profit from uncertainty caused by his own wrong. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery." *Story Parchment Co.*, 282 U.S. at 565-66, 51 S.Ct. at 241.

In *Zenith* such a way was found. Damages arising more than five years after a 1954 agreement to exclude the plaintiff from the Canadian market were held to have been too speculative as of 1954 and thus not barred by a limitations period commencing in 1954. The Court sought to assure that antitrust plaintiffs would not suffer injury that could never be remedied. It believed the defendants could have prevented Zenith from any recovery for post-1958 damages in a 1954 suit by claiming that any injury past that date was speculative. Such also was the result in *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018, 92 S.Ct. 680, 30 L.Ed.2d 666 (1972), in which suit was brought in 1968 stemming from the 1963 termination of a distributorship agreement. The court held that damages accruing between 1964 and 1968 would have been too

speculative for suit in 1963 and that, as a consequence, could be recovered in the 1968 suit.

The standard established in *Story Parchment Co.* does not always lead to a *Zenith* result, however. Thus in *Charlotte Telecasters, supra,* 546 F.2d 570, the Fourth Circuit held that future profits of a cable television system were not too speculative to be subject to proof. *See El Paso v. Darbyshire Steel Co.,* 575 F.2d 521 (5th Cir. 1978). Also in *Monona Shores, Inc. v. United States Steel Corp.,* 374 F.Supp. 930 (D. Minn. 1973), a district court held that the extent of damages flowing from a foreclosure subject to further judicial proceedings was ascertainable as of the date the foreclosure was commenced. The court stated:

> It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable. . . . [I]n some cases . . . damages are better proven at a later time. However, that does not mean at an earlier point in time, enough evidence of damage was not available to allow the issue to go to the jury.

374 F.Supp. at 936.

In this case each appellee during 1964 had expressed without qualification its intention not to use the Smog Burner. AMF admits that by the end of 1964, the size of the market for 1966 model year cars could be estimated with reasonable accuracy. AMF had been counting on this one year model market to establish its product; without it the Smog Burner project in late 1964 was being phased out. Appellees are accused of an absolute exclusion of AMF. No difficulties with projecting market share existed in late 1964 that do not exist today. We hold, therefore, that the undisputed facts establish that

the fact of injury to AMF was certain prior to January 10, 1965, and that the extent of such damage was neither too speculative nor its amount or nature unprovable. This being the case, without regard to the other issues raised on appeal, this action is barred by 15 U.S.C. § 15b and the district court properly entered judgment for appellees.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1648

April 18, 1979

In re:
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF, INCORPORATED,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AMERICAN MOTORS CORPORATION and AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.,
Defendants-Appellees.

ORDER

Before: SNEED and HUG, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Hug have voted to reject the suggestion for a rehearing en banc, and Judge East has recommended rejection of the suggestion for rehearing en banc.

*Hon. William G. East, Senior United States District Judge, for the District of Oregon, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-259

AMF INCORPORATED,
Petitioner

v.

GENERAL MOTORS CORPORATION, *et al.*

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Washington, D.C. • THIEL PRESS • (202) 638-4521

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

M.D.L. Docket No. 31
Civil No. 71-16-R

[Filed: Feb. 18, 1976]

IN RE:
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,
Plaintiff,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO ALL DEFENDANTS AND SEPARATE FINDINGS OF FACT RELATING TO CHRYSLER CORPORATION

The motions of defendants other than Chrysler for summary judgment and the motion of Chrysler for summary judgment having been duly heard upon the pleadings, depositions, documents, memoranda, affidavits and oral argument herein, the Court hereby finds the following facts and reaches the following conclusions of law:

I.

PRELIMINARY

1. In this lawsuit, AMF alleges that the defendant vehicle manufacturers conspired to boycott a direct flame afterburner motor vehicle exhaust emission control device partially developed by AMF in cooperation with and under licenses from the inventor, Charles Morris, and the Chromalloy Corporation. AMF also alleges that defendants conspired and attempted to monopolize a market defined as "air pollution control equipment" for motor vehicles, and that defendant General Motors in fact monopolized a market defined as "air pollution control equipment."

2. As a result of the claimed violations, AMF alleges, it lost profits that it otherwise would have earned.

3. Initially, AMF requested that this case remain on the back burner while related city and state cases in M.D.L. Docket No. 31 were litigated.

4. AMF directly participated in the discovery in those cases, however, and after those cases were dismissed by this Court in November 1973, AMF was permitted to conduct further discovery in connection with its case.

5. During this same period, defendants were for the first time provided the opportunity to depose present and former AMF employees.

6. Over one hundred depositions have been taken of knowledgeable scientists, engineers, and executives.

7. This discovery is now complete, the record is adequate for summary judgment and there is no disputed issue of material fact to prevent the entry of judgment for defendants.

II.

DEFENDANTS' EMISSION CONTROL ACTIVITIES

8. In the early 1950's, in response to research implicating motor vehicles in the formation of Los Angeles' photochemical smog, vehicle manufacturers entered into research related to motor vehicle emissions. In the course of this research, vehicle manufacturers conducted emission research into the development of new and improved instrumentation and measurement techniques; the physical and chemical nature of photochemical smog and vehicle emissions; and the development and testing of emission control devices, including deceleration devices, crankcase ventilation devices, catalytic converters, direct flame afterburners, engine modifications, exhaust manifold air injection, and other systems.

9. During the course of this research, vehicle manufacturers worked with and assisted non-vechicle manufacturers in the development of emission controls. Non-vehicle manufacturers also had access to the Los Angeles County Air Pollution Control District and the California Motor Vehicle Pollution Control Board for approval of devices.

10. Subsequent to the discovery that motor vehicles contributed to Los Angeles' photochemical smog, and in response to requests for the Director of the Los Angeles County Air Pollution Control District, vehicle manufacturers also entered into cooperative activities related to motor vehicle emissions. These activities consisted of exchanging technical information on motor vehicle research and controls pursuant to a cross-licensing agreement. These activities also consisted of the presentation and advocacy of industry viewpoints to legislative and regulatory authorities.

11. These activities were carried out under the auspices of the Automobile Manufacturers Association, ("AMA", now defendant Motor Vehicle Manufacturers Association of the United States, Inc.), through technical committees of the Association. These technical committees were composed of engineers and scientists employed by vehicle manufacturers.

III.

CALIFORNIA EMISSION REGULATIONS

12. In 1959, at the direction of the California Legislature, the California Department of Public Health promulgated standards for motor vehicle exhaust emissions. Four months later the Legislature created the Motor Vehicle Pollution Control Board, for the purpose of testing control devices for compliance with those standards. Under the law, when two devices were certified by the Motor Vehicle Pollution Control Board as being in compliance with the standards, subsequent to one model year thereafter all new cars sold in the State had to be certified as being in compliance with those same standards.

13. Vehicle manufacturers assisted the Motor Vehicle Pollution Control Board in setting up test procedures for exhaust control devices submitted by companies desirous of certification.

14. Between 1961 and 1964 forty-three (43) applications for certification of exhaust control devices were submitted to the California Board.

15. After the Board relaxed its standards to permit averaging of test results over the required 12,000-mile durability run, the Board certified four exhaust control devices in June, 1964. Three of these were catalytic

mufflers that were certified for new cars only. The fourth was a prototype direct flame afterburner invented by Charles Morris and further developed by the Chromalloy Corporation and AMF. This device was conditionally certified for new vehicles and for post-1962 model used vehicles.

16. Under California law, certification of these devices meant that new 1966 model vehicles sold in California would have to be certified as being in compliance with California's exhaust emission standards.

IV.

THE AMF DEVICE

17. The AMF device certified by the California Board was an experimental prototype. It was not intended for use on production vehicles.

18. AMF applied for certification of the certified device in December, 1963.

19. At the time of certification, in June 1964, the California Board Staff Report on the AMF device stated in part as follows:

> "The system complies with the Board's criteria with the following exceptions:
>
> a. Adequate service life data beyond 12,000 miles are as yet lacking, nor has a specific warranty been finalized;
>
> b. Comprehensive device servicing plans of the applicant beyond one year, in order that adequate performance, commensurate with the test data, be ensured, are as yet lacking. . . ."

20. For these reasons, the Board Staff Report on the AMF device stated:

"3. Affirmative action by the Board for factory installation approval implies heavy reliance on the applicant and the automobile manufacturer who utilizes the device, to scale up production of it, to correct slight malfunctions in it, and to adapt it to the variety of vehicle model options involved, without sacrificing its performance or durability.

"4. A device Servicing System which ensures proper annual maintenance of the control system is absolutely essential before the contribution of this device to reducing vehicular pollution will correspond to the emission reductions claimed for the device."

21. The Board Staff Report on the AMF device also stated that during "on the road" testing the AMF device emitted 48% more hydrocarbons and 60% more carbon monoxide than during the 7-mode dynamometer tests used for certification purposes. The Report further stated that "these differences are viewed by the staff as amounting to a substantial adverse discrepancy."

22. In September, 1965, at the beginning of the 1966 model year, the California Legislature refused to grant to the California Board the authority to enforce the compulsory maintenance that the Board believed was necessary for performance of the four devices certified in June, 1964. For that reason, the Board decertified these devices, including the AMF device.

23. This decertification made use of the AMF device illegal under California law.

24. The AMF device that was certified and then decertified by the California Board was not the device that AMF intended to sell to the defendants.

25. The AMF certification device was approximately three feet long and incorporated a muffler, while the device that AMF intended to sell to vehicle manufacturers was smaller and of different configuration, with a smaller combustion chamber, shorter heat exchanger tubes, a different ignition system, and shorter internal parts.

26. No AMF production device was ever submitted to or certified by the California Board.

27. Even if the smaller device that AMF intended to sell to defendants was similar in principle to the certified device, the California Board had a specific formal procedure that AMF would have had to follow in order to obtain certification for that smaller device.

28. AMF never complied or attempted to comply with that procedure.

29. Use of any AMF production device on motor vehicles in California would therefore have been illegal.

V.

THE NON-EXISTENCE OF ANY AMF PRODUCTION DEVICE

30. The version of the AMF device temporarily certified by the California Board was approximately 28.5 inches long, incorporated a muffler as an integral part of the assembly, and had a heat exchanger consisting of 12 round tubes. The first proposed AMF production device was only 14.5 inches long, did not incorporate a muffler, and had 32 relatively flat tubes in the heat exchanger.

31. Testing of this proposed production device by AMF demonstrated that the heat exchanger tubes were subject to warping.

32. AMF therefore abandoned this design and submitted to vehicle manufacturers new envelope drawings describing two different versions of production devices that it proposed to sell. One of these, the Mark XII(Y), was 17.3 inches long, 9.5 inches wide, and 4 inches thick. The other, the Mark XII(Z), was 15.8 inches long, 7.5 inches wide, and 4 inches thick.

33. Hardware samples of these devices were never built by AMF. Instead, defendants were furnished samples of the certified AMF experimental unit.

34. In September, 1964, AMF proposed another new production device, known as the SK 6000. The dimensions of that device were to be 20.2 inches long, 9 inches wide, and 3.12 inches thick.

35. Despite requests made by vehicle manufacturers for samples of AMF production devices, AMF never furnished samples of any production device to Ford, General Motors, or Chrysler.

36. When samples of the SK 6000 production device were furnished to American Motors in September and October of 1964, performance was poor. One of the reasons was because the reduced size caused problems in the burner "lighting."

37. By this time, General Motors, Ford, and Chrysler had already decided to use control systems other than AMF's.

38. American Motors rejected AMF very shortly—within three weeks—thereafter.

39. There was no AMF production device in existence at that time.

40. At that time AMF had a concept, not a device.

VI.

THE AMF DEVICE AND VEHICLE MANUFACTURERS

41. Despite requests from vehicle manufacturers, AMF refused to provide any sample AMF hardware for testing by vehicle manufacturers until just prior to certification by the California Board in June, 1964.

42. In June and July 1964 AMF provided defendant vehicle manufacturers with samples of its certified device. At that time, AMF displayed to defendant vehicle manufacturers an empty shell represented by AMF as being intended to convey the outside configuration of the projected production device.

1. General Motors

43. During the 1950's and 1960's, years before AMF entered into its joint venture with Chromalloy, the General Motors Research Laboratories built and tested experimental afterburners. From this research, General Motors concluded that direct flame afterburners were not very promising as exhaust emission controls.

44. More promising than afterburners, in the view of General Motors engineers, was the concept of exhaust manifold air injection, upon which General Motors began working in 1959.

45. In March, 1962, General Motors engineers published an SAE paper describing work on air injection.

46. In February, 1964, four months prior to the first submission of sample afterburner hardware by AMF to General Motors, General Motors management decreed that air injection was to be the system utilized by General Motors in meeting the California standards.

47. At the same time, General Motors mangement further instructed the General Motors car divisions that they were to set a design objective for introduction of that system by the 1966 model year.

48. At that time, AMF had not yet submitted an afterburner sample for evaluation by General Motors. Although General Motors had been requesting such a sample for years, AMF continued to refuse to provide one until just prior to certification by the California Board in June, 1964.

49. As a result, General Motors was already committed to air injection when AMF finally submitted an experimental afterburner prototype for evaluation in June, 1964.

50. General Motors tested the experimental prototypes that AMF finally submitted, and its engineers concluded that performance of the AMF device was unsatisfactory.

51. In the course of this testing, General Motors engineers discovered that AMF's afterburner ignition system adversely affected the vehicle engine ignition. In order to overcome this problem, the Delco-Remy division of General Motors designed, built, and installed a new afterburner ignition system.

52. General Motor's engineers advised AMF of their solution of the engine ignition problem.

53. The AMF device tested by General Motors was the experimental prototype certified by California in June, 1964. General Motors requested that AMF provide samples of the AMF intended production device, but AMF never provided any.

2. Chrysler

54. Prior to 1964, in the course of work on afterburners, Chrysler developed afterburner designs of its own, and cooperated in research and testing with others.

55. Chrysler's efforts covered a number of different afterburner designs, including one which combined afterburner features with those of catalytic converters, and Chrysler worked with several outside suppliers on such designs.

56. In spite of its efforts, Chrysler did not overcome the problems it believed to be inherent in direct flame afterburners. As early as 1961 Chrysler became discouraged with afterburners.

57. After certification of the AMF prototype by the California Board, sample AMF prototype certification units were supplied to Chrysler for test.

58. By that time, Chrysler had submitted its "Cleaner Air Package" of engine modifications to the California Board for certification, and Chrysler was fully committed to that package.

59. Chrysler engineers tested the AMF experimental device and concluded that it was unsatisfactory on Chrysler vehicles.

60. In November of 1964 AMF withdrew its units from Chrysler for further work by AMF. AMF never furnished any further samples to Chrysler. Despite requests by Chrysler, AMF never furnished a production unit to Chrysler for test.

3. Ford

61. By March, 1962, Ford engineers had come to believe that the air injection concept was more promising

than either catalytic converters or direct flame afterburners, and they published that conclusion in a March 1962 SAE paper.

62. Prior to 1964, Ford requested that AMF submit a sample afterburner to it for test, but AMF refused. Not until June, 1964, three months after Ford management directed that the Company be prepared to meet the California exhaust requirements by the beginning of the 1966 model year, did AMF submit sample afterburners to Ford.

63. By then, Ford engineers concluded that air injection would be the preferred system in complying with their management's directive, based on a 40-car test fleet that Ford had set up in February 1964.

64. Subsequently, sample AMF afterburners were furnished for installation on three Ford vehicles. These prototype afterburners were of the type conditionally certified by California.

65. Ford requested samples of the smaller so-called "production" device, but AMF never furnished any.

66. Ford engineers tested the device submitted by AMF and concluded that air injection was a preferable approach.

67. On July 23, 1964, the Ford engineering staff recommended that Ford's 1966 models use the air injection approach to control emissions.

68. Contemporaneous Ford documents in July and early August 1964 state that Ford's choice of emission control in order of preference was as follows:

1. Air injection;
2. Engine modifications;

3. Walker Manufacturing's catalytic converter;
4. The AMF direct flame afterburner.

69. By August 12, 1964, Ford decided that air injection was to be the Ford approach and shortly thereafter Ford returned the AMF certification models to AMF.

4. American Motors

70. American Motors first requested a sample of the AMF afterburner for evaluation and testing in November 1962. AMF responded that it was deferring submitting units to any vehicle manufacturer until an improved prototype could be developed.

71. AMF promised to contact American Motors with an improved prototype by the beginning of 1963, but AMF did not in fact make a device available for testing by American Motors until May 1964. The device provided by AMF at that time was the experimental type certified by the California Board.

72. At that time, AMF represented that the AMF device was essentially ready for production, and American Motors engineers, impressed with the unit and with AMF's presentation, ordered samples.

73. At this time, American Motors' engineers were hopeful that the AMF device would prove to be a solution to at least some of American Motors' emission problems.

74. As a result of tests on devices furnished by AMF, American Motors' engineers concluded that the AMF afterburner was not satisfactory on American Motors cars.

75. In September and October of 1964, AMF furnished samples of a production type of AMF device to American Motors, but performance of these samples was poor. These were the last samples furnished by AMF to any of the defendants.

5. Motor Vehicle Manufacturers Association

76. The defendant Motor Vehicle Manufacturers Association does not purchase or manufacture emission control devices, nor does it manufacture motor vehicles. There was no agreement, conspiracy or concert of action between MVMA and any manufacturer defendant concerning the use of third-party devices or concerning AMF's device.

6. Other Vehicle Manufacturers

77. An AMF production prototype burned a hole in the floor mat and rear seat of an International Harvester test vehicle.

78. Mercedes Benz tested an AMF device and found it unsatisfactory for use on its vehicles.

79. Other companies, including Toyota, Volvo, and Rover, also tested AMF devices.

80. No vehicle manufacturer, foreign or domestic, ever purchased any AMF device. Alternative systems of control, including air injection and engine modifications, were used instead.

VII.

THE FOUR-YEAR PERIOD OF LIMITATION

81. The instant suit was not filed until October 1970.

82. Each manufacturer defendant reached its decision to use an approach other than the AMF device during 1964.

83. AMF was informed of each such decision during 1964.

84. As a result of these rejections, and as a result of a November 1964 refusal by the California Board to certify a second device for used cars, AMF decided to minimize its afterburner program. Only a skeleton staff was kept on by AMF after December 1964. The AMF afterburner program was put on a "close-out" basis in December 1964, and most of the people who had worked on that project were terminated that same month.

85. By the end of 1964, AMF had the conviction that no orders for AMF's smog burner would emanate from any Detroit automobile manufacturer.

86. By the end of 1964, Harold Lipchik, AMF Vice President and General Manager of the AMF Western Division and the afterburner project, had concluded that there was a conspiracy among vehicle manufacturers to boycott AMF.

87. The rejections by defendants in 1964 resulted in immediate loss in the market value of AMF's afterburner business, loss of AMF's prior investment, and loss of AMF's potential business on 1966 models.

88. By the end of 1964, AMF could predicte [sic] with precision the size of the 1966 vehicle market in California.

89. AMF has shown no valid reason for its failure to file this lawsuit prior to October 1970, given the state of its knowledge as early as December 1964.

90. Under the theory of AMF's case, the rejections of the AMF device in 1964 were the "overt acts" that

resulted in adverse impact upon AMF. As a result of these acts, AMF laid off employees and otherwise wound-down its afterburner business at the end of that year.

91. Subsequent to 1964, AMF's ability to prove with requisite certainty the existence and amount of its alleged damages became more rather than less speculative.

VIII.

DESTRUCTION OF DOCUMENTS

92. At the end of 1964, many documents relating to the AMF afterburner and various forms of prototype AMF afterburner hardware were in AMF's possession at AMF facilities in Los Angeles. Additional afterburner documents were in AMF's possession at AMF facilities in Springdale, Connecticut.

93. AMF never issued any instructions to any employees to retain any of these documents and hardware.

94. Many of these documents and hardware were turned over to Chromalloy by AMF in May of 1966 and subsequently destroyed in about 1970.

95. Other documents relating to the AMF afterburner were shipped by AMF to its facilities in York, Pennsylvania, sometime in 1966 where they were subsequently destroyed by AMF.

96. The delivery and destruction of these materials and hardware occurred subsequent to the time when Mr. Lipchik, AMF Vice President and General Manager of the AMF Western Division and the afterburner project, as well as others in AMF top management, came to believe that AMF had been the victim of a conspiracy to boycott.

97. This delivery and destruction occurred subsequent to the publication of articles in various national newspapers—articles known to AMF—containing reports of allegations and investigations relating to vehicle manufacturers' work on emission controls.

98. AMF did not issue any orders with respect to retention of afterburner documents even after receiving a 1966 subpoena from the Los Angeles Federal grand jury investigating the subject of vehicle emissions.

99. Only a half-drawer of documents was turned over to the grand jury by AMF.

100. AMF did not make any effort after receipt of the subpoena to retrieve or have preserved any of the documents or prototype units it had given away. These documents and prototype units were subsequently destroyed.

101. AMF witnesses have repeatedly testified that the destruction of these documents has impaired the accuracy and completeness of their testimony.

102. One example illustrates the gravity of this situation. In the instant case, AMF contends that it eventually developed a small production burner, radically different from the certified device, capable of meeting the California standards on defendants' vehicles. There are no hardware and no test data records to support this claim.

103. Although two AMF employees testified that tests of such a production device were successfully conducted, the senior AMF engineer on the afterburner project testified that the last versions of the small production device submitted to Detroit performed poorly. Mr. Morris also wrote in August 1965 that "to have a

smog burner exhaust device which is thoroughly proven will take more than one year."

104. The best evidence of whether a small production device was developed that would have met the standards are the original test data records.

105. Under the circumstances, AMF's disposal of these records creates a presumption that their contents would be unfavorable to AMF—that is, that the contents would show that the device would not have met the standards.

106. AMF's disposal of these records with knowledge of the existence of its cause of action also requires the exclusion of all secondary AMF testimony to the effect that the device, if it ever existed, did in fact meet the California standards.

IX.

THE MONOPOLY CLAIM AGAINST GENERAL MOTORS

107. Each vehicle manufacturer used its own system in meeting California emission standards.

108. In its opposition to the summary judgment motion, AMF makes clear with regard to its monopoly claim against General Motors that what it is complaining about is the sale by General Motors to Ford and American Motors of "air pumps for air injection purposes." This is the claimed relevant market.

109. AMF does not manufacture, nor has it ever manufactured or offered to sell, air pumps. AMF does not compete in the air pump market.

110. AMF is not in the target area of the claimed monopolization.

111. There were and are a number of sources of air pumps for air injection purposes other than General Motors.

112. General Motors did not have a monopoly of air pumps nor of air pumps for air injection purposes.

113. General Motors succeeded in selling air pumps to Ford and American Motors because of the technical quality of the General Motors air pump.

114. There is no evidence of any illegal activity relating to the sale of air pumps by General Motors.

115. AMF asserts that Ford executed three year requirements contracts for their pump needs.

116. Such contracts are common in the motor vehicle industry.

117. Such contracts are reasonable, particularly in light of the need for General Motors to build a new plant in order to produce the pump in sufficient capacity.

118. Ford tested air pump designs from four suppliers in addition to General Motors. Ford also had under development two different designs of pumps that Ford might manufacture. The Ford pumps could not be ready in time for the 1966 model year. As a result of testing of the other pumps, Ford concluded that the General Motors pump was the most satisfactory.

119. General Motors assisted Ford in developing the capacity for Ford to manufacture its own air pumps.

120. General Motors licensed Bendix, Holley, Mitsubishi, and Toyota to use the General Motors air pump design.

121. General Motors' contracts to sell air pumps to Ford and American Motors posed no barrier to AMF.

122. To the extent that Ford and American Motors turned to technology that did not require the use of air pumps, they did not need to purchase pumps from General Motors.

123. General Motors' sales of pumps declined in 1968 as Ford and American Motors turned to engine modification systems that did not require the use of air pumps.

X.

CONSUMER DEMAND

124. An individual motorist is not adversely affected by the emissions from his own vehicle alone—that is, whether or not he uses control devices on his single individual vehicle makes no detectable difference in overall air quality.

125. As a result, a typical vehicle purchaser does not consider emission controls, in contrast to such items as stereo radios and air conditioners, to be of value to him, and he is not willing to purchase them unless compelled by law to do so.

126. Accordingly, there is no consumer demand for vehicle emission controls.

127. Because of this absence of consumer demand, decisions as to what emission controls motorists are to be required to buy involve legislative and regulatory decisions rather than marketplace judgments.

128. Absent legislation requiring installation of emission controls, there was no incentive for a vehicle manufacturer to install emission control devices. The manufacturer who did so would be at a cost disadvantage relative to the manufacturer who did not.

XI.

SEPARATE FINDINGS RELATING TO CHRYSLER CORPORATION

129. At the time AMF first brought its approach to Chrysler, in May of 1964, Chrysler had become convinced that the best approach to vehicle emission control was engine modification. Emission control by engine modification involves changes in the vehicle's carburetor, distributor, cylinder design and other engine components, all of which are designed to control emissions within the engine rather than burning them somewhere downstream in the exhaust system, as did the AMF approach. The following events led to that conviction.

a. Prior to AMF's even acquiring rights to the device it sought to develop, Chrysler Corporation, for a number of years, had had an active program aimed at solving the automobile emissions problem. That program was conducted in part on a Chrysler-only basis and in part by Chrysler's participation in various committee activities with members of the AMA, pursuant to a Cross License Agreement, the Coordinating Research Council ("CRC"), a group consisting of automobile and oil company representatives and representatives of the Federal Government, and in cooperation with various governmental agencies including the Los Angeles Air Pollution Control District ("APCD"), the State of California and Federal groups, as well as with professional and nonprofit associations concerned with the emissions and air pollution problem. Chrysler viewed such cooperation as the most expeditious means of coming up with a solution to the emission problem.

b. As a principal part of this work, Chrysler led in the work of the CRC committee which conducted the Los Angeles Riverbed Survey in 1956. This survey gave a picture of characteristic emissions—under different operating conditions. This was supplemented *inter alia,* when, in 1958, in Cincinnati, Chrysler conducted, in cooperation with the United States Public Health Service, an emissions survey on some 200 vehicles, which survey was carried on wholly independently of Chrysler's AMA activities.

c. In the late 1950's, Chrysler's studies of this and other data led to close study of engine modification and maintenance as a method of emission control.

d. Chrysler's first publication concerning this method of control was at the January, 1959, Society of Automotive Engineers ("SAE") meeting. That paper concluded that substantial reductions could be obtained by proper maintenance and modification. Soon after that publication, in February of 1959, Chrysler told of its findings to a joint session of the California Legislature. Chrysler continued to actively pursue this approach during 1960 through 1962, and thereafter, while at the same time keeping California officials and others informed of its work.

e. In March of 1962, Chrysler again published a paper at the SAE on its engine modification approach. By that time it was possible to and Chrysler did make 100 engine modification kits, known as Cleaner Air Package ("CAP") kits, available to both private and governmental laboratories for testing and evaluation of this approach.

f. Chrysler's next step in moving toward installation of CAP was to run a 1,000 car production test of

cars modified to use the principles of CAP. This test was announced in November of 1962 and began the next Spring. The purpose and effect of Chrysler's production test was to see how CAP would perform in the hands of the public and to see what type of driveability problems arose in the field.

g. This approach also received extensive further testing on Los Angeles County cars. In late 1963 the County of Los Angeles adopted an emissions specification of its own, of 300 parts per million ("ppm") HC and 1.5 percent CO, to be applied in the purchase of County vehicles. Chrysler was the first, and for a period of time the only, automobile company to bid on these vehicles and to sell cars in accordance with the Los Angeles standard. These fleet sales by Chrysler continued during 1964 and 1965. The performance of these cars was continuously evaluated.

h. Chrysler applied for Motor Vehicle Pollution Control Board ("MVPCB") certification of CAP in July of 1963. Such certification was necessary to sell cars equipped with CAP in California. All this was long before AMF came to Chrysler. The State certification process Chrysler went through was an extremely rigorous one and as such Chrysler did not receive certification for some 16 months. Chrysler received certification for CAP in November of 1964 and proceeded to install CAP on its 1966 California models.

i. Chrysler's decision to install CAP on its 1966 and subsequent model year vehicles sold in California and nationwide was made totally independently by Chrysler and was based on Chrysler's conclusion that CAP was the most efficient and least costly way of meeting the various emission standards promulgated

by the State of California and subsequently by the Federal Government.

130. Whereas Chrysler had great experience with CAP, AMF gave it no satisfactory opportunity to test its device and Chrysler could not prudently have used it. The facts in this regard are as follows:

a. At the time of AMF's presentation of its device to the automobile manufacturers in Detroit on May 19, 1964, no arrangements were made to deliver a device to Chrysler for testing because, as Chrysler advised AMF, it was heavily involved in its CAP efforts.

b. Once the AMF device was certified, Chrysler requested and, in July of 1964, received an AMF device for testing. The AMF device supplied, however, was not what AMF proposed to offer as a production device but rather was that version of its device which had been certified.

c. Chrysler repeatedly requested from AMF information as to when a production device would be available for Chrysler's testing but never received such a device in response to these requests.

d. In response to Chrysler's request for price information, AMF informed Chrysler that firm pricing data was not available but gave an estimated cost for the device and auxillary parts of $26.75. Additional pricing information was never supplied to Chrysler although AMF had indicated such information would be forthcoming.

e. At AMF's request, Chrysler's testing of the AMF prototype device was terminated in November of 1964 and the device was returned to AMF.

f. Upon returning that device to AMF, Chrysler again requested a production device for testing and was informed at that time that AMF's present forecast was that such devices would not be available until the Spring of 1965.

g. AMF never afforded Chrysler an opportunity to evaluate its sup[illegible]sed production device.

h. Such testing as Chrysler was able to complete indicated that it was not satisfactory for use on Chrysler's cars.

i. Chrysler's conclusion that CAP was a more efficient means of meeting emissions standards than that presented by AMF was based on the extensive research and development it had performed on CAP and the obvious need for additional development work on the AMF device it was given to evaluate before that device could be produced and installed on vehicles. In addition, that evaluation performed by Chrysler on the AMF device it was given to test showed the device created both fuel consumption and back pressure problems.

j. Chrysler also concluded that CAP was by far less costly to install. That conclusion was based on the fact that the only price information supplied it by AMF put the cost of the AMF hardware alone, uninstalled, at $26.75, while the cost to Chrysler of CAP as installed on its 1966 model year vehicles ranged from $6.04 to $21.17, this latter cost being for its highest priced vehicle, with most costs falling between the $6.00 to $12.00 range.

131. Chrysler's decision to use CAP in preference to the concept being advocated by AMF had nothing to do with the fact that other automobile companies rejected

the AMF concept. There was no agreement, conspiracy or concert of action between Chrysler and any other company concerning the use of third party devices or concerning AMF's device.

a. Chrysler's approach was not the same as that of other companies. The CAP approach used by Chrysler in meeting the 1966 California standards was different from the air injection approach used by all other defendants that year and Chrysler's advocacy of the merits of this approach was and had been a substantial matter of dispute within the automobile industry.

b. The dispute over the merits of the engine modification approach to emission control began with Chrysler's first publication on this approach, in 1959, and continued even after CAP's certification. This dispute manifested itself in various ways including statements by other defendants to California officials, during CAP's certification testing, that CAP would not work and at least one attempt, after CAP's certification, to, in effect, have it legislatively de-certified. That attempt was unsuccessful.

c. Chrysler's work with and sales to Los Angeles County were a matter of dispute within the automobile industry but, nevertheless, Chrysler continued to make sales.

d. Chrysler's certification application met with substantial opposition from various members of the MVPCB, its Staff, and from Donald Jensen, its Executive Director. But Chrysler persisted.

e. The fact that the validity of the engine modification approach, as advocated by Chrysler, was a matter of dispute within the automobile industry in no way served to deter Chrysler's efforts on that approach. Chrysler proceeded with complete independence.

f. Chrysler at no time agreed with any other defendant herein, or anyone else, that it would not cooperate with suppliers or potential suppliers in the development and installation of emission control equipment.

g. Long prior to AMF's acquiring the rights to the Smog Burner device Chrysler had begun an active cooperative research program with Thompson-Ramo-Wooldridge ("TRW") on various configurations of direct flame afterburners.

h. Chrysler and TRW freely exchanged information as part of this program and jointly published a leading technical paper in March of 1962 on their developments.

i. TRW eventually ceased working in this area upon concluding that the afterburner was not the proper way to go in resolving the emissions problem.

j. In addition to this work with TRW, Chrysler conducted extensive flame afterburner work on its own and in cooperation with others than TRW, and worked with various chemical and muffler companies on catalytic converters. Chrysler eventually rejected the catalytic approach due primarily to lead poisoning and thermal problems it encountered.

k. Chrysler followed this same practice of cooperating and working closely with suppliers in its CAP development work. Chrysler viewed such cooperative work as essential to its program in that many of the key components of CAP, particularly the carburetor and the deceleration valve, were purchased from outside suppliers.

l. Chrysler at no time agreed with any other defendant herein or anyone else as to what to install,

or not to install, on its vehicles or when such installations would be made.

m. At no time did Chrysler agree with anyone to hold back any form of emission control or to take any step which was intended to or had the effect of delaying any form of emission control.

132. The only additional part added to Chrysler's CAP cars for emission control purposes was a valve designed to advance distributor spark timing during vehicle deceleration. All remaining emission reductions with CAP were accomplished through modifications in already existing engine components. Most of these key components were purchased from outside suppliers, including the carburetor and the above described deceleration valve. AMF's competitors as to Chrysler's business were the suppliers of such equipment rather than Chrysler. Chrysler was not in competition with AMF in the market of vehicle emission controls.

XII.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter.

2. Venue is proper in this court.

3. To the extent that any of the foregoing findings are conclusions of law, they are incorporated herein. To the extent that any of the following conclusions are findings of fact, they are incorporated therein.

4. The cross-licensing agreement did not violate the antitrust laws.

5. Defendants' cooperative program relating to emission controls and activities conducted pursuant thereto did not violate the antitrust laws.

6. The presentation and advocacy of industry viewpoints before legislative and regulatory authorities did not violate the antitrust laws and was constitutionally protected.

7. Defendants' rejections of AMF did not violate the antitrust laws.

8. Defendants were entitled to reject AMF for business reasons sufficient to each.

9. Defendants were under no obligation to cooperate with AMF in perfecting the AMF concept.

10. AMF cannot prove that it was foreclosed from any market by any act of defendants unlawful under the antitrust laws.

11. AMF did not meet the condition precedent to entry into the marketplace, namely certification of a production device by the State of California. The experimental prototype was also decertified.

12. AMF was not an actual or potential entrant to this market because it failed to satisfy the essential conditions precedent to entry.

13. AMF never had a device to be the subject of any boycott.

14. It would be error to permit any jury to speculate that even if AMF had developed a production device the California Board would have certified it.

15. [Defendants' proposed finding deleted by the Court.]

16. AMF cannot prove that any AMF device would have been used under any circumstances.

17. Even if AMF had some evidence of illegal acts directed toward outsiders, it still would not be entitled

to recover because it can not prove any impact upon itself or any damages.

18. AMF is barred by the statute of limitations.

19. AMF's destruction of and failure to preserve documents and hardware with knowledge of the existence of its cause of action creates a presumption that their contents would be unfavorable to AMF—that is, that the contents would show that no AMF production device would have met the California standards—and requires the exclusion of all secondary AMF testimony to the effect that the device, if it ever existed, did in fact meet the California standards.

20. [Defendants' proposed finding deleted by the Court.]

21. With regard to the monopolization claim against General Motors:

(1) AMF was not in the target area of the claimed monopolization;

(2) General Motors has no monopoly in the claimed market;

(3) AMF has no evidence of any illegal acts by General Motors; and

(4) Sales by General Motors in the claimed market had no impact upon AMF.

22. Defendants did not conspire to boycott, attempt or conspire to monopolize, or monopolize any market related to motor vehicle emission control devices.

23. AMF was not injured by, nor can it prove any damages as a result of, any unlawful acts of defendants.

24. There is no disputed issue of material fact to prevent the entry of judgment for defendants.

25. The issues which plaintiff attempts to raise on this motion are irrelevant.

26. Defendants are entitled to judgment as a matter of law.

DATED: 2/18/76, 1976.

/s/ Manuel L. Real
Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

M.D.L. Docket No. 31
Civil No. 71-16-R

[Filed: Feb. 18, 1976]

IN RE:
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,
Plaintiff,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Defendants.

SUMMARY JUDGMENT

The motions of all defendants for summary judgment came on for hearing before the Court on January 19, 1976, the Honorable Manuel L. Real, District Judge, presiding. The Court considered the pleadings, said motions, the papers filed in support thereof, the other papers on file herein, and the arguments of counsel. It appearing that there is no genuine issue as to any material fact, and that said defendants are entitled to judgment on the Complaint as a matter of law,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That in accordance with the findings of fact and conclusions of law made herein, judgment be entered in favor of each of said defendants against plaintiff on the Complaint herein and that plaintiff take nothing on said Complaint from said defendants;

2. Said defendants and each of them shall have and recover from plaintiff their costs incurred herein.

DATED: February 18, 1976.

/s/ Manuel L. Real
Judge

No. 79-259

In the Supreme Court of the United States

OCTOBER TERM, 1979

IN RE:

MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,

Petitioner,

vs.

GENERAL MOTORS CORPORATION, et al.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-259

IN RE:

MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,

Petitioner,

vs.

GENERAL MOTORS CORPORATION, et al.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the District Court have been separately filed by petitioner in the Supplemental Appendix. The opinion of the Court of Appeals, and the order unanimously denying the Petition for Rehearing and Suggestion for Rehearing En Banc, are reproduced in the Appendix to the Petition.[1]

[1] References to the Petition and the Appendix to the Petition are cited as "Pet." and "Pet. App.", and to the Supplemental Appendix as "Pet. Supp. App." Unless otherwise noted, all emphasis is supplied.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1978. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 18, 1979. At the request of petitioner, the time to petition for certiorari was extended by this Court to August 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether this Court should review the determination of the Court of Appeals that the four-year period of limitation bars this 1970 action alleging a boycott "commenced" and "announced" in 1964 (complaint, ¶¶ 29, 35), when the record establishes that (1) each respondent did reject petitioner AMF's "afterburner" exhaust control device in 1964; (2) each respondent unequivocally so informed AMF at that time; (3) AMF as a result "cut back" its afterburner program and terminated "almost all" of its afterburner personnel at the end of that year; (4) AMF concluded at that time that its rejection was the result of a conspiracy to boycott; (5) AMF was at that very moment able to predict "very, very precisely" the dimensions of the vehicle market from which it had been excluded; and (6) AMF's ability to prove with requisite certainty the existence and amount of its alleged damages became more rather than less speculative with the passage of time since 1964.

STATEMENT OF THE CASE

On October 23, 1970, petitioner AMF, Inc. filed this action against respondents,[2] claiming that they had conspired

[2] General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and the Automobile Manufacturers Association (now the Motor Vehicle Manufacturers Association of the United States, Inc.).

to boycott an afterburner exhaust control device invented and developed by an individual named Charles Morris in collaboration with the Chromalloy Corporation, and later, AMF. The AMF case was coordinated for pretrial discovery with a number of previously filed city and state cases relating to the alleged conspiracy, but at AMF's request, its case remained on the "back burner" while the city and state cases were litigated. After they were dismissed by the District Court in 1973 (*In Re Multidistrict Vehicle Air Pollution*, 367 F.Supp. 1298 (C.D. Cal. 1973), *aff'd* 538 F.2d 231 (C.A. 9, 1976)), discovery in the AMF case was renewed by both parties.

At the conclusion of extensive discovery,[3] respondents moved for summary judgment. The District Court granted respondents' motion on a number of grounds,[4] including the statute of limitations.

[3] Over 100 depositions were taken, and over 250,000 pages of documents were produced to plaintiff.

[4] The District Court granted respondents' motions for summary judgment on a number of grounds besides the statute of limitations. Its conclusions of law included the following (Pet. Supp. App. 29b-30b):

"8. Defendants were entitled to reject AMF for business reasons sufficient to each.

11. AMF did not meet the condition precedent to entry into the marketplace, namely certification of a production device by the State of California. The experimental prototype was also decertified.

13. AMF never had a device to be the subject of any boycott.

16. AMF cannot prove that any AMF device would have been used under any circumstances.

23. AMF was not injured by, or can it prove any damages as a result of, any unlawful acts of defendants."

The Court of Appeals did not find it necessary to reach these points, on any one of which the District Court's order granting summary judgment could have been sustained.

AMF appealed that decision to the Court of Appeals for the Ninth Circuit, and that Court affirmed. (Pet. App. 1a). Finding the action to be barred by the statute of limitations, the Court found it unnecessary to review the several other grounds supporting the summary judgment below. AMF's Petition for Rehearing and Suggestion for Rehearing En Banc was denied. The full Court was advised of the suggestion for en banc rehearing, and no judge of the Court requested a vote on the suggestion. (Pet. App. 16a).

THE FACTS

In 1959 and 1960, the California legislature directed the California Department of Public Health to promulgate standards for vehicle exhaust emissions and created the California Motor Vehicle Pollution Control Board ("the Board"). Under the law, one full model year after the Board certified two devices as enabling vehicles to meet the standards, all new passenger cars sold in the State of California would have to be certified as being in compliance with those standards. (R. 4031, 4035; Pet. Supp. App. 4b-5b).

Beginning in 1961 and continuing thereafter, the Board tested exhaust control devices submitted by many companies without success until June, 1964, when, after the Board relaxed its standards, it was able conditionally to certify four devices for use on 1966 models. (Pet. Supp. App. 5b-6b). Three of these were catalytic converters and the fourth was the prototype Morris/Chromalloy/AMF "afterburner."

The prototype AMF device certified in 1964 was not the device that AMF intended to develop, manufacture, and sell to respondents. Rather, the temporarily certified—and

subsequently decertified[5]—device was a large "experimental" model that differed substantially from AMF's subsequently proposed much smaller "production" device which was never certified. Indeed, AMF never submitted it to the Board for approval. (Pet. Supp. App. 7b). (See Figure 1 on page 6).

[5] At the time the Board certified the experimental AMF device in June, 1964, the Board recognized that the device had substantial shortcomings that could only be overcome by compulsory annual maintenance, and the Board conditioned certification upon adoption of a scheme of mandatory maintenance. (Pet. Supp. App. 5b-6b). In September 1965,—at the very beginning of the 1966 model year—the California legislature withdrew from the Board all authority to enforce compulsory maintenance of exhaust devices, and the Board thereupon effectively decertified the AMF device and the three catalytic converters previously certified. (R. 3540). The Board's decertification made use of the AMF afterburner illegal under California law, (Pet. Supp. App. 6b). (See, *e.g.*, Calif. Stat. 1960, 1st Ex. Sess., c. 23, p. 350, ¶1, former California Health & Safety Code §24395, now §39130).

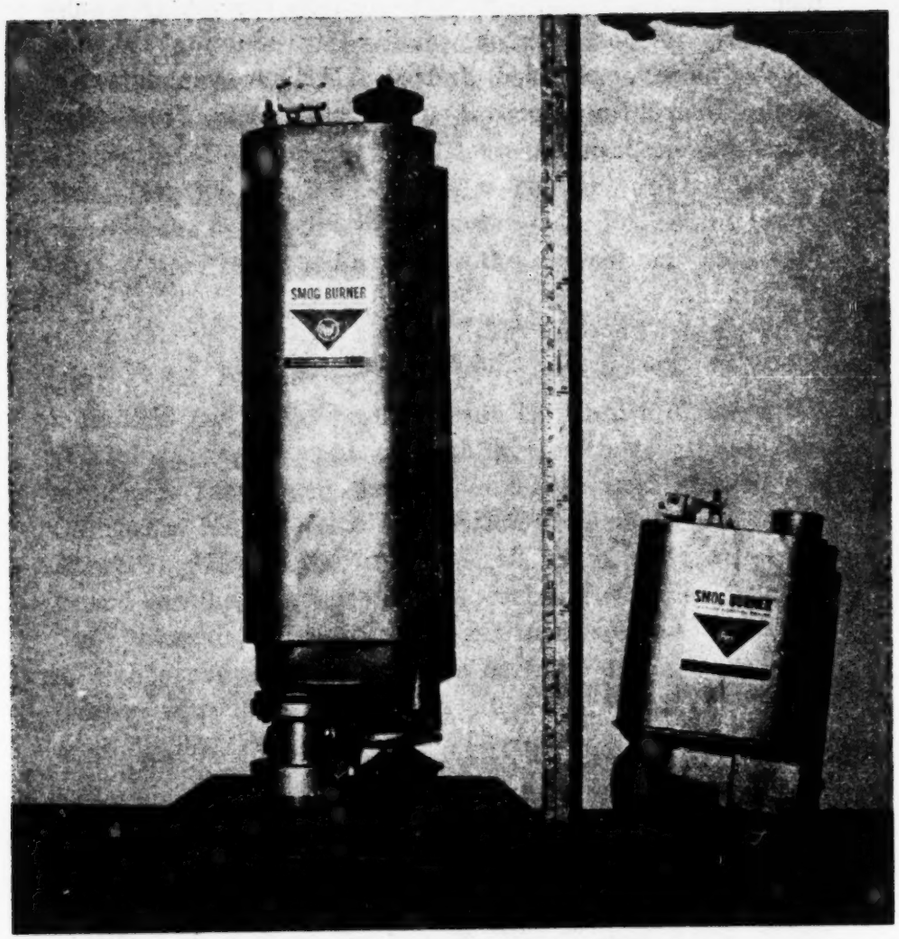

Figure 1

Conditionally Certified Prototype Model

Uncertified Proposed "Production" Model

Engineers from each vehicle manufacturer tested sample devices provided by AMF. American Motors alone received a version of a smaller production device; other companies were given samples of the larger experimental device. Because of poor test results, each defendant decided in 1964 to use control systems other than AMF on its 1966 models and so informed AMF at that time—six years prior to AMF's suit.

American Motors. American Motors first requested a sample of the AMF afterburner in November, 1962, but AMF refused to submit units to any vehicle manufacturer until an "improved" prototype could be developed. (R. 3531; Pet. Supp. App. 9b). Although AMF promised at that time to make a device available for testing "after the first of the year [1963]" (R. 3531), AMF persisted in its refusal to provide a device until 18 months later, in May 1964. (Pet. Supp. App. 13b). The reason for this continued refusal was the existence of unsolved problems with the AMF device.[6]

In June 1964, AMF finally made the large experimental model available for evaluation by American Motors. Tests proved that it did not meet the California emissions standards on American Motors Cars:

> "Of the four units which we have on test, three do not meet the standard; and the remaining one, while it met the standard, failed and had to be returned to the supplier.

---

[6] Lipchik (AMF) Deposition 21; Seltzer (AMF) Deposition 65. Charles Morris, the inventor of the AMF device, testified that he disagreed strongly with AMF's decision to withhold the device from the defendants:

> "I said, 'Also I think we should be doing something to work with the auto industry in this thing. . . .
>
> "If you do not have their confidence or build their confidence in what it can do and it can stand up, then they are certainly not going to buy it." Morris Deposition 77.

> "The supplier said that this failure should not be counted against them since *it did not represent the final design.*"[7]

Nevertheless, American Motors continued to test AMF devices. In September, 1964, it actually received a version of the AMF "production" unit, and several were installed on American Motors vehicles. All were removed after less than 200 miles of testing because they were unable to meet emissions standards or rendered the vehicle undrivable. (Pet. Supp. App. 13b; R. 3534; 4199-4200). As a result, on October 26, 1964 (R. 4198) American Motors rejected the AMF afterburner for these reasons, as well as because its "flame-throwing" characteristic (*i.e.*, its tendency to belch fire from the exhaust) made it an unmarketable product.[8] (Hittler (AMC) Deposition 166, 381-386).

AMF employees themselves conceded the poor performance of these last devices furnished to American Motors. Ralph Davis, the senior AMF engineer on the afterburner project, testified that:

> "... the later devices, some of the last devices we sent to Detroit, the performance was rather poor."[9]

---

[7] American Motors, Flame Afterburner—American Machine and Foundry, August 5-September 1, 1964, at 1-2; R. 3533.

[8] The device also burned a hole in the floor mats and rear seat of an International Harvester vehicle. (Pet. Supp. App. 14b).

[9] Davis Dep. 89. Charles W. Morris, the inventor of the AMF afterburner, also testified that testing of the proposed AMF "production" device produced "a rather sorry looking test specimen." Morris Dep. 171. Indeed, Mr. Morris described the outermost tubes in that device "to be warping on the outside and the inner ones were in a few cases rather truncated with jagged upper edges. . . ." Morris Dep. 177.

Even putting the AMF device in its best light, counsel for AMF had to admit to the District Court that "It was not ready to finally install on an automobile, your Honor . . . it had a commercial potential." (Transcript of Proceedings, January 19, 1976, at 34).

Ford. Beginning in the early 1960s, Ford requested that AMF submit a sample afterburner to it for testing. AMF refused until June, 1964.[10] (Pet. Supp. App. 12b). By then, Ford engineers, who had been working on air injection as early as the late 1950's, believed that air injection would be the preferred system in complying with their management's directive:[11]

> "... [W]e predict at this time that we will be recommending the Thermactor air injection approach for Job #1, 1966".[12]

Subsequently, AMF furnished samples of the bulky experimental units for installation on three Ford vehicles. These units failed to meet carbon monoxide standards on two of four tests.[13] Ford requested samples of the smaller so-called "production" device. AMF never furnished any "production" units at all to Ford. (Pet. Supp. App. 12b).

Ford knew in the summer of 1964 that the lead time required to engineer an emission control system for installation on 1966 model Ford vehicles to be sold in California, which would first roll off the assembly lines in July 1965, was getting short.[14] For this reason Ford engineers stated

---

[10] AMF's refusal to do so earlier reflected the views of its president in 1963 who "did not think this was the proper time to approach the automobile manufacturers" because he believed that AMF "should not demonstrate merchandise . . . [when] you are 'encountering annoying difficulties'." (Gott Dep. Ex. 5).

[11] See Pet. Supp. App. 12b-13b.

[12] E. Horton, Implications of Recent California Decision on Company Smog Control Plans, June, 1964 at 1 (R. 3525).

[13] Ford Engine and Foundry Division Product Engineering Office, Report on Vehicles Equipped with California Approved Hang-On Devices, October 29, 1964, at 6 (R. 3525-3526); Hagen Affidavit ¶4; (R. 3590).

[14] AMF was fully aware of the need for substantial lead time. On May 3, 1964, for example, W. M. Kennedy, an AMF automotive consultant, informed AMF that the lead time for the automobile companies after receiving production samples from AMF would be a minimum of 12 months and probably longer. (Gott Deposition Ex. 10).

that their judgment, based on an accumulated four years of experience with air injection, was that the Ford air injection system was the system upon which Ford should concentrate:[15]

> "At the point in time that we decided what would go on the 1966 vehicles [Summer 1964], we considered [air injection] to be the best system we knew how to put on at that point in time."

Indeed, when in 1964 Ford decided to use air injection, Ford rated the AMF afterburner dead last among the four systems Ford considered (air injection, engine modifications, the Walker catalytic converter, and the AMF afterburner, in that order) (Misch Dep. Ex. AHM2; Chandler Dep. Ex. AJMC 36).

General Motors. During the 1950's and 1960's—many years before AMF even entered into its joint venture with Chromalloy—the General Motors Research Laboratories built and tested experimental afterburners, as a result of which General Motors scientists and engineers concluded that direct flame afterburners such as the AMF device were "unlikely to work in any configuration."[16] (Pet. Supp. App. 9b).

More promising than afterburners, in the view of General Motors' engineers, was the concept of exhaust manifold air injection, upon which General Motors began working in 1959[17] (Pet. Supp. App. 9b). In February, 1964—four months prior to the first submission of sample afterburner hardware by AMF to General Motors—the General Motors Engineering Policy Group, with the concurrence of the Executive Committee of the General Motors Board of

[15] Hagen Affidavit ¶¶7-9 (R. 3591-3593), Chandler Deposition 744-45; Misch Deposition 465-66, 531.

[16] Caplan Deposition 17-20, 37-38, 68; Caris Deposition 215-16.

[17] Caris Deposition 263-70.

Directors, decided that air injection was to be the system utilized by General Motors in meeting the California standards. (Pet. Supp. App. 9b).

At that time, AMF had not even submitted an afterburner sample for evaluation by General Motors. Although General Motors had been requesting such a sample for years,[18] AMF continued to refuse to provide one until June, 1964. As a result, General Motors was already committed to air injection when AMF finally submitted an experimental afterburner prototype for evaluation in June, 1964. (Pet. Supp. App. 10b).

Nonetheless, General Motors tested the experimental prototypes that AMF finally submitted—with negative results. Not only did the afterburner not operate during all driving conditions, but it was considered by General Motors engineers to be "very marginal" on controlling carbon monoxide. Further, the carburetor setting insisted upon by AMF as necessary to meet the California emissions standards caused what General Motors engineers considered to be unacceptable vehicle "surge" at cruising speeds. As a result, General Motors remained committed to air injection.[19] (Pet. Supp. App. 10b). As stated by Mr. Caris, the engineer in charge of the General Motors Power Development Section wherein the AMF device was evaluated:

> "The evaluation demonstrated that the AMF device was inferior to air injection. Accordingly, I had no reason to suggest to anyone in General Motors management that the earlier design objective to use air injection be changed and I did not do so."[20]

[18] Caplan Deposition 55-56; Caris Deposition 218.

[19] Homfeld Deposition 243-46; Caris Deposition 223; Caris Affidavit ¶8; Homfeld Affidavit ¶7 (R. 3567-3568); Johnson Affidavit ¶¶6-7 (R. 3574-3575).

[20] Caris Affidavit ¶8 (R. 3571).

Chrysler. During the 1950's and 1960's Chrysler also conducted extensive research on afterburners, developing designs of its own as well as cooperating in joint development efforts with suppliers. (Pet. Supp. App. 11b). Chrysler's Charles Heinen, a man characterized by California officials as "an evangelist"[21] with respect to emission controls, testified:

> "Rather a large continuum of experimental [afterburner] devices that we tried . . . I mean which one do you want to talk about? I can give you almost every conceivable design, and we tried it at one time or another." (Heinen Dep. 1165-1166).

The failure of these efforts caused Chrysler to become discouraged with the prospects for afterburners as early as 1961—even prior to AMF's entry into work with Charles Morris and Chromalloy. (Pet. Supp. App. 11b). As Mr. Heinen testified:

> "Q. On or about the date of Exhibit 50 [October 1961] you were becoming disenchanted with the prospects of successfully applying the principle of a flametype afterburner, is that correct?
>
> A. It kept flaming out on me, yes. Everything we tried kept flaming out on me, and so I was getting a little discouraged. I tried every material that I thought was known to man at the time.
>
> • • •
>
> I didn't give up on it, as you know, but I was getting pretty darned discouraged with it, yes." (Heinen Dep. 1164-1165).

More promising than afterburners—or any other control system—in Chrysler's view, was a system of engine modifications developed by Chrysler and known as the "Cleaner Air Package." Chrysler submitted that system to the California Board for certification in July, 1963—more

[21] Sweeney Deposition 33; Hass Deposition 591.

than eight months prior to AMF's application on the AMF device that was eventually conditionally certified[22]—and Chrysler received unconditional certification for that system in November, 1964.

Chrysler was far down the road with its Cleaner Air Package when in July, 1964, it received an AMF sample of the "experimental" unit for testing. Chrysler requested but never received a sample of the AMF "production" device. (Pet. Supp. App. 11b; R. 3415-18).

When Chrysler tested the experimental AMF device it proved unsatisfactory on Chrysler vehicles, as "AMF people" admitted to Heinen. (Heinen Deposition 1152-1153; 1243-1245; Fagley Deposition 133-39; Ulyate (AMF) affidavit ¶8; R. 4154-55). Heinen testified:

> "Q. Was it your opinion on November 25, 1964 that the AMF unit had failed the tests?
>
> "A. Yes. The full test, including back pressure and all the rest. It was also the opinion of the AMF people; that's why they wanted to take it back and work on it. So they told me anyhow.
>
> • • •
>
> "[T]hey requested us to take it off, they'd go back, they'd work on some of the things they'd found out during our testing, they'd replace it with another unit."[23]

They never did. (A. 10).[24]

[22] R. 3521; Heinen Deposition 111.

[23] Heinen Deposition 1242-1244.

[24] AMF conceded in its answers to interrogatories that foreign vehicle manufacturers were not parties to the alleged boycott (R. 3051). These manufacturers, like respondents here, tested and rejected the AMF device. Harold Lipchik, who was in charge of the AMF afterburner project, confirmed that the AMF device was rejected by several foreign manufacturers (Mercedes Benz, Toyota, Volvo, and Rover) whom AMF admits were not parties to the alleged boycott. (Lipchik Deposition, 190-94).

Each of the respondent vehicle manufacturers informed AMF in 1964 that its device had been rejected (Pet. Supp. App. 156).—Chrysler "prior to the 24th" of June; Ford and General Motors by at least August 12; and American Motors on October 26.[25] As a result of these rejections, and as a result of an October, 1964 California Board refusal to trigger the law for used cars, AMF then "cut back" its afterburner program and "terminated" almost all of its afterburner personnel in December 1964.[26] AMF also refused to attend a January 7, 1965 California Board hearing on exemption requests for certain limited production vehicles because of its "conviction that no orders for [AMF's] Smog Burner would emanate from any Detroit manufacturer." (R. 2921; AMF Answer to Interrogatory 71.)[27]

At the time of its rejections by respondents, AMF already knew the dimensions of the market it had lost. As testified by Harold Lipchick, AMF's Vice President and the General Manager in charge of the afterburner project:

> ". . . There is some association that puts out sales data, automobiles throughout the United States, state by state, model by model, *great reams of data.* I forget who did it.
>
> Q. . . . [Y]ou were able to predict what the [vehicle] market was?

[25] Heinen Deposition 1374-75; R. 3021-22, 3549.

[26] Lipchik Deposition 11, 167-70; R. 3550-3551.

[27] In the light of this record, the District Court concluded: "* * * no six people in the jury box, from the facts which are set forth in this record, could reasonably come to the conclusion that the production model of AMF would receive California approval. Can't do it." (Transcript of Proceedings, January 19, 1976, at 60).

> A. Very, very precisely, I would say, because that data was available historically . . . .[28]

Also, at that time, AMF had concluded that it had been excluded from this market because of a conspiracy to boycott.[29]

Despite the foregoing, AMF filed no lawsuit whatever during the ensuing four years—notwithstanding articles in national newspapers (noted by AMF) reporting allegations and investigations relating to vehicle manufacturers' work on emission controls,[30] and notwithstanding receipt by AMF of a subpoena from a Los Angeles federal grand jury investigating the subject of vehicle emission controls.[31]

Ultimately, AMF waited over six years after its rejection by respondents, over six years after being informed of these rejections, over six years after concluding that it would receive no orders from respondents, almost six years after "cutting back" its afterburner program and terminating "almost all' of its afterburner personnel, and over six years after concluding that it had been a victim of a conspiracy to boycott before filing this suit. In the interim, AMF destroyed and/or gave away great quantities of documents and hardware, thereby impairing evidence, including

[28] Lipchik Deposition 51-52. This was confirmed by AMF's Business Manager. Seltzer Deposition 43-44.

[29] Lipchik Deposition 5-7, 10-11, 298, 345-46; Robins Deposition 58-59, 61.

[30] *E.g.*, AMF Memorandum, September 15, 1964, at 2 (R. 3559); *Los Angeles Times,* January 20, 1965; *Wall Street Journal,* April 7, 1966.

[31] Coffey Deposition 7, 10, 18-19.

particularly the recollection and testimony of numerous AMF witnesses.[32] (Pet. Supp. App. 166-186).

AMF's petition refers to several incidents occurring after January 10, 1965. We show at pp. 21-23, *infra*, that these few episodes did not constitute continuing conspiratorial conduct; that they did not establish that respondents' prior rejections of petitioner's product were not final; and that they caused petitioner no new injury.

[32] The policy of the statute of limitations, of course, is to prevent the destruction of evidence, which is precisely what happened in this case.

REASONS FOR DENYING THE PETITION

The decision below turns on the application to the peculiar facts of this case of the principles pronounced by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-339 (1971), with respect to the statute of limitations governing antitrust cases. The Court of Appeals' opinion demonstrates that it painstakingly followed *Zenith*, and that its application of the *Zenith* principles was entirely reasonable. The decision is fully consistent with the cases in other circuits which petitioner asserts to be in conflict with it, in none of which did the facts bear any resemblance to those at bar. All of the cases, including the decision below, are consistent with *Zenith* and with each other in applying the *Zenith* principles to different sets of facts. No general question of law is presented. Since there is no conflict of decision and the case turns upon its facts and was correctly decided, no grounds for granting certiorari have been shown.

Petitioner asserts (and the Court of Appeals assumed) that the cut-off date for the statute of limitations is January 10, 1965.[33] (See Petition fn. 7, p. 10). Petitioner seeks

[33] The government civil suit filed on January 10, 1969, did not allege a group boycott, however. See the Complaint in *United States* v. *Automobile Mfr's Assn., Inc.*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970). As conceded by AMF in its brief in the Court of Appeals:

> "While various other cases were brought against the same defendants, including a Department of Justice civil action, the AMF case was *the only one* claiming market foreclosure. . . ." (Opening Brief, p. 1)

In this circumstance, the statute of limitations as to AMF was not "tolled" by the government civil suit filed on January 10, 1969. The Court of Appeals did not find it necessary to reach this point, however, because it found that petitioner's claim was already time-barred by January 10, 1969. (Pet. App. 6a, n.1)

to avoid the bar of the four-year limitation statute on two theories:

(1) That respondents' alleged concerted refusal to deal with petitioner continued after January 10, 1965; and

(2) That petitioner's damages were speculative and unascertainable on that date, and that therefore petitioner is entitled to prove its damages now.

Neither of these positions is well taken. Our discussion of these issues will also show that the lower courts did not err in holding that respondents were entitled to summary judgment.

1. Petitioner's first contention is that the court below disregarded the holding in *Zenith* as to the effect of a continuing conspiracy, and that its decision is in conflict particularly with the decisions of the Fifth Circuit in *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117 (C.A.5, 1975), cert. denied 423 U.S. 1054 (1976), and *Imperial Point Colonnades Condominium* v. *Mangurian* 549 F.2d 1029 (C.A. 5, 1977), cert. denied 434 U.S. 859 1978). To the contrary, the *Zenith, Poster* and *Mangurian* cases were the precise sources relied upon by the court below for the principles which it applied to petitioner's allegations of continuing conspiracy. (See Pet. App. 7a, 9a and 10a)

As stated in *Zenith* (401 U.S. at 338) and quoted below (Pet. App. 7a):

> "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . This much is plain from the treble-damage statute itself. 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."

The petition (p. 15) seems to regard the statement in *Mangurian* (549 F.2d at 1035) that "no new cause of action accrues for the damages occurring within the limitations period *because no act committed by the defendant within that period caused them*" (emphasis the court's) as in some way inconsistent with the decision below. The court below, however, relied on the expression of exactly the same concept in the preceding sentence in *Mangurian*, which reads as follows:

> "[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff.*" (Emphasis the court's.)

On the same page, the Fifth Circuit's *Mangurian* opinion noted that. in *Poster*, "we distinguished cases where all the damage complained of by plaintiff necessarily resulted from an initial pre-limitation act." *Mangurian* (at 1035) quoted from *Poster* (517 F.2d at 128) the statement also quoted by the court below, which exactly fits this case, that:

> "It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action."[34]

[34] Petitioner also claims conflict with the Third Circuit's decision in *Harold Friedman, Inc.* v. *Thorofare Markets, Inc.*, 587 F.2d 127, 137 (C.A. 3, 1978). *Friedman*, however, quotes the statement

(footnote continued)

Each of these statements of the law supports respondents' position here. See also *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F. 570 (C.A. 4, 1976); *Suckow Borax Mines Consol., Inc.* v. *Borax Consol., Ltd.*, 185 F. 2d 196, 208 (C.A. 9, 1950), cert. denied 340 US. 943 (1951); *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854 (C.A. 6, 1963), followed in *Sherman* v. *Goerlich's, Inc.*, 341 F.2d 988 (C.A. 6, 1965), cert. denied 382 U.S. 830 (1969). The cases relied upon in the petition illustrate the application of the continuing conspiracy principle but in no way conflict with the decisions below in the case at bar.

Here, each automobile manufacturer's complete rejection of plaintiff's afterburner occurred in 1964 while each company was designing its new models for retail sale in September or October, 1965. Any devices to be added had to be coordinated with the basic structure before designing and tooling became final, and this required ample lead time before production of the finished automobiles. Significantly, after each of the manufacturers had refused to purchase petitioner's afterburner, AMF manifested its *own* awareness that these were definitive rejections by the automobile manufacturers by "almost a complete reduction of personnel" assigned to the afterburner program. Also, AMF attempted to "seek other business and other jobs for the persons who were involved." This occurred "very shortly thereafter . . . . December [1964] is the

(footnote continued)
in the introductory sentence to the same paragraph of *Mangurian* that "a cause of action accrues each time a defendant commits an act that injures plaintiff." 587 F.2d at 139, quoting 549 F.2d at 1035. *Friedman* concluded that "the position of the Fifth Circuit is well-reasoned, and we adopt it." The Tenth Circuit in *Fitzgerald* v. *General Dairies, Inc.*, 590 F.2d 874 (C.A. 10, 1979), upon which the petitioner also relies, in its brief paragraph on this point (p. 876) does little more than cite *Zenith* and *Mangurian*.

termination of the group of people." Lipchik Dep. 11, 167-170. (Mr. Lipchik was the General Manager in charge of AMF's Smog Burner program.) There were no comparable facts in *Mangurian, Poster* or *Fitzgerald.*

None of the acts occurring after January 10, 1965 upon which petitioner relies as continuing conspiratorial conduct within the statutory period establishes that the manufacturers' 1964 rejections of petitioner's product were not final or that petitioner could possibly have supplied a certified working device in time for the 1966 model year.[35]

(a) The petition says that in April, 1965 Ford rejected an AMF offer to supply Smog Burners. The entire evidence on this incident was that in answer to an oral inquiry to two Ford engineers by an AMF representative as to "whether Ford had any new interest in the AMF-

[35] Petitioner now asserts that its claim for damages is not limited to that year but extended to future years. After June 1965, however, all of the systems selected by respondents had been certified by the California Board, and petitioner's device never was. Thus it never could lawfully have been used. Furthermore, on September 10, 1964, after AMF's experimental prototype had been rejected by respondents, Mr. Lipchik informed AMF employees that AMF had never expected to sell afterburners for more than "one year." As stated by Mr. Lipchik in his memorandum to AMF employees on that date:

> "The SMOG BURNER was designed specifically for both new and used cars because we never believed that the new car market would be very big or last very long. We felt that, *at best,* we could only count on *one year* of new cars and we made our plans based on this approach."

Mr. Lipchik testified that this memo was truthful. Lipchik Deposition 160. Mr. Lipchik further testified that the reason AMF planned on no more than one year of new car sales was because "we had felt that in time the manufacturers would either by new engines or other improved engines come up with *their own approaches.*" *Ibid.*

Chromalloy Smog Burner," he "was told that although we were not connected with the production release activities we knew that Ford was not . . . interested in undertaking additional developmental testing of the Smog Burner at this time." (R. 5831). This hardly constitutes an additional rejection of the Smog Burner for a period different from that covered by the 1964 rejection when Ford had determined to use the system then found to be the most feasible.

(b) The Petition asserts that defendants engaged in "predatory below-cost pricing in July, 1965, specifically aimed at foreclosing AMF's device from the market." (Pet. 16). Whether or not the manufacturers lost money on their anti-pollution devices,[36] nothing in the record shows that their prices in July, 1965, or thereafter, were in any way aimed at foreclosing AMF's non-existent device from the market. That would have been the least of their worries at that time.

(c) The reference to the joint development of an air pump in 1965 is equally irrelevant. Ford and American Motors used the pump developed by General Motors—very reluctantly insofar as Ford was concerned (R. 4511-4515) —because it was the best available. Nothing in the record suggests that, if they had not done so, they would have turned to AMF's Smog Burner.[37] Ford, for example, the only manufacturer even to *rank* the AMF device, had previously listed that device as its *last* choice after air injection, Chrysler's engine modification system, and Walker's catalytic converter (Misch Dep. Ex. AHM 2; Chandler Dep. Ex. AJMC 36). Petitioner's claim (Pet. 18) that "defendants had no alternative to the AMF Smog Burner until mid-1965" is utterly without foundation or support in the record.[38]

(d) Petitioner asserts that the defendants induced foreign automobile manufacturers to sign the Cross-Licensing Agreement in June, 1965 "precisely at the time AMF was trying to sell them its device" (Pet. p. 7). Even if this were true (and there is no evidence of record to support the claim of "inducement"), it would be irrelevant, because the Cross-Licensing Agreement in no way precluded any of its signatories from purchasing devices from AMF or anyone else. It provided merely for the interchange of information and joint cross-licensing among the signatories, without any bar against their use of the products of outsiders.[39] (Sherman Dep. Ex. 6). Moreover, petitioner overlooks the fact that it conceded below that foreign manufacturers were not parties to any boycott. (R. 3051).

Thus there is no support in the record for petitioner's inaccurate assertions of the continuance of conspiratorial

[36] There is no legal requirement that the cost of each particular component in a manufactured product (which in this case involves more than 15,000 separate parts) must be recovered independently in the pricing of the end product.

[37] Three other devices (all catalytic converters) had been conditionally certified at the same time as AMF's prototype device.

[38] Petitioner's references to "the potential preference for its device over defendants' costly and less effective system" (Pet. 7) and to "state law requir[ing] that all cars sold in the state be equipped with a certified device like plaintiff's" (Pet. 3) are equally imaginative.

[39] The Petition also asserts that General Motors made false representations to the Board with respect to the need for body changes to accommodate the certified devices. The representations referred to were not only not false, but related to the *Walker catalytic converter*—not the AMF afterburner—and, in any event, they were made in 1964 (R. 5234-35) and are of no help to petitioner's efforts to avoid the bar of the statute of limitations.

conduct into the statutory period. The rejection by the Court of Appeals of petitioner's contentions reflected an accurate understanding of the law and also of the weakness of petitioner's factual arguments. And apart from the merits, the court's application of undisputed legal principles to the particular facts of this case does not warrant review by this Court.

2. Petitioner's second contention is that the Court of Appeals incorrectly applied the *Zenith* "speculative damage" doctrine to the facts of this case. However, the Court of Appeals, as its opinion demonstrates, correctly understood the meaning of *Zenith*. That Court recognized that if unlawful acts take place outside of the limitations period, a plaintiff suffering future damages which are unprovable at that time and therefore unrecoverable within that period will be permitted to assert his cause of action to recover such damages when they are no longer purely speculative. In this respect, as with respect to petitioner's first contention, the Court of Appeals took its law directly from *Zenith*.

Zenith does not, however, mean that future damages, as to which there is always some uncertainty, can *never* be proved without waiting for the future to transpire, or that a plaintiff must wait until his damages are provable with *certainty* before filing suit. What the Court was concerned with in *Zenith* was the situation in which an attempt to measure future damages would have been so speculative that no damages at all could have been awarded. The Court's object was certainly not to postpone into the future those cases presently triable in which damages are awarded, despite inevitable inexactitudes, under the rule of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co.* v. *Paterson Paper*

Co., 282 U.S. 555, 562 (1931).[40] *See also Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F. 570 (C.A. 4, 1976); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352 (C.A. 9), cert. denied 429 U.S. 1074 (1977).

Moreover, the Court of Appeals correctly applied the foregoing *Zenith* rule to the facts of this case. In the instant case, AMF had everything that it needed in order to sue in 1964, and it therefore does not fall within the *Zenith* exception. Furthermore, nothing that occurred after 1964 rendered AMF's proof of damages any less speculative, as both lower courts recognized.

By October 1964, for example, AMF knew that it had been rejected by each respondent; it knew that as a result it had lost its potential business on respondents' vehicles; it had as a further result put into effect "almost a complete reduction of personnel;" and it had converted its afterburner project to a "close-out basis." At that time, AMF was also able to predict "very, very precisely"—to use its own words—the total 1966 vehicle market, and it could clearly then have gone to a jury with the claim that it had

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[40] As observed in *Monona Shores, Inc.* v. *United States Steel Corp.*, 374 F. Supp. 930, 936 (D. Minn. 1973):

> "It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable. This court is aware that in some cases, and perhaps this is one, damages are better proven at a later time. However, that does not mean at an earlier point in time, enough evidence of damages was available to allow the issue to go to the jury. When there is enough evidence to allow the issue to go to a jury the damages are no longer spectulative, notwithstanding that at a later time better evidence of damages might become available."

lost business and the profits that it would have earned therefrom.[41] As AMF's own counsel argued below:

> "We believe that in an open market that we would have got let's say 75 percent on the basis of the merit and the price of our device. The evidence will be the merits, it will be what their system cost them to put into effect.
>
> ". . . we would be probably hard pressed to say that Chrysler would have bought it, the AMF device. I mean that is just on the matter of economics.
>
> "Beyond that on the free market we think the rest would have. . . ."[42]

AMF's present claim that respondents' 1964 rejections of AMF were "prospective and contingent" and that it therefore "would have been impossible as of January 10, 1965, for AMF to know whether it would ultimately suffer complete, partial or no exclusion from the state-mandated market for exhaust control devices" (Pet. 12), is patently false. In the first place, the 1964 rejections were blunt and explicit, not contingent. As stated by Mr. Lipchik, AMF's Vice President and the General Manager of the afterburner project, in a contemporaneous October 1964 letter to the California Board, for example:

> "The fact remains, and *we have been told this in no uncertain terms by several of the automobile companies,* that they have no intention of using the AMF/Chromalloy device or any other independent device."[43]

Moreover, the rejection by respondents was sufficiently clear to AMF for AMF to "cut back" its afterburner operation and to terminate its employees at the end of 1964; AMF did not wait until defendant's "certification" to take this action. Indeed, throughout the course of the litigation below AMF attempted to justify certain of its actions—including its refusal to attend the January 7, 1969 California Board exemption hearing—on the ground that it *knew* it was out of business prior to January 10, 1965.[44]

Petitioner also hoists itself on its own petard when it argues that its damages were "speculative." Petitioner asserts that its damages were too speculative to have justified any recovery prior to January 10, 1965 because prior to then no one could forecast what its share of the market would be until it was known whether respondents' systems would be certified. But when they were and petitioner's was not, petitioner's possibility of proving damages was certainly not improved. If anything, the definiteness of petitioner's damages was reduced (arguably to zero) by these events, rather than increased—as the district court and the Court of Appeals explicitly found:

> "Subsequent to 1964 AMF's ability to prove with requisite certainty the existence and amount of its alleged damages became more rather than less speculative" (Fdg. 91, Pet. Supp. App. 16b).
>
> "No difficulties with projecting market share existed in late 1964 that do not exist today." (Pet. App. 14a).

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[41] See also *Monona Shores, supra,* at 937:

"Plaintiffs certainly cannot be arguing that the ***market value*** of their interest was not damaged by the commencement of foreclosure proceedings. At that point in time they certainly could have gone to a jury with the claim that their interest had been destroyed. Expert appraisals are proper evidence in such cases although they might require predictions in making calculations."

[42] Transcript of Proceedings of January 19, 1976, at 87-88.

[43] Letter from H. Lipchik to D. Jensen, October 29, 1964, p. 3. Lipchik Dep. Ex. 59. Mr. Lipchik further testified that AMF was aware its device would not be used "long before" this letter was written. Lipchik Deposition 158.

[44] R. 2921.

Accordingly, petitioner's damage claim is barred either by the statute of limitations or because it remains as speculative and unprovable today as petitioner now asserts it was on January 10, 1965.[45] Inasmuch as the result is the same in either event, no question important enough for this Court to review is presented.

Nor are the cases relied upon by petitioner—*Ansul Co.* v. *Uniroyal, Inc.*, 448 F.2d 872 (C.A. 2, 1971), *cert. denied*, 404 U.S. 1018; *Harold Friedman, Inc.* v. *Thorofare Markets, Inc.*, 587 F.2d 127, 128-39 (C.A. 3, 1978); and *Continental-Wirt Electronics Corp.* v. *Lancaster Glass Corp.*, 459 F.2d 768, 770 (C.A. 3, 1972)—inconsistent with the result below. In the first place, in each of those cases the speculativeness in the damages resulted not from the actions of the defendants alone but rather from uncertainty as to the future actions of others—a situation not present in the instant case. Moreover, in none of the cases cited by plaintiff did the passage of time render the plaintiff's proof of damages *less*, rather than more, certain.

In *Ansul*, the main case relied upon by plaintiff, for example, it could not be determined whether termination by a supplier had damaged a distributor until the willingness of *others* to supply the same products to the distributor, and at what price, was known. In the instant case, however, the 1964 rejections by respondents deprived AMF of its market on those vehicles without regard to the actions of others. The respondents *themselves*—not third parties—

[45] AMF's claim that certification of respondents' systems was so "speculative" an event as to prevent it from filing suit (Pet. 6-7, 18) leads to the same result. After all, no AMF production device was ever certified, and the AMF experimental device was decertified by California at the very start of the 1966 model year. If AMF is correct, therefore, in its claim that certification is so speculative an event as to bar filing its suit, then AMF is necessarily barred from the *present* suit by reason of its failure to obtain certification.

determined whether AMF would supply devices for use on their vehicles.

Similarly, in *Continental-Wirt* a cutoff of supply might or might not ultimately have forced plaintiff to discontinue business and to sell its assets, while in *Harold Friedman* an unlawful 1971 agreement between a supermarket chain and a shopping center forced plaintiff to vacate the center in 1974 and to suffer damages as a result of its inability to relocate until November 1975—"damages that could not be anticipated in 1971."[46] In the instant case, however, petitioner's exclusion as a result of respondents' independent 1964 rejections was readily and immediately apparent in 1964, as petitioner and its executives conceded below. The results in *Ansul, Continental-Wirt* and *Harold Friedman* are therefore not inconsistent with the result in this case.

3. The above analysis of the two substantive questions raised by the petition deals with the facts upon which petitioner relies for its contention that respondents were not entitled to summary judgment. It demonstrates that the facts asserted either have no support in the record or do not contradict the evidence upon the basis of which summary judgment was granted, much of which comes from the testimony of AMF's officials.

As is customary in antitrust cases, the party against whom summary judgment was granted has cited *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) and its progeny for the proposition that summary procedures should be used sparingly in such litigation. But when exhaustive discovery demonstrates that plaintiff has no case, summary judgment is as appropriate in antitrust cases as in others. *E.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968).

[46] 587 F.2d at 139.

This case presents no general or important questions of law. It involves no conflict among the courts of appeals but only a challenge to the lower court's application of recognized principles to particular facts. Accordingly, certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-259

AMF INCORPORATED,
Petitioner

v.

GENERAL MOTORS CORPORATION, *et al.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents, in their Brief in Opposition, admit the existence of "several incidents occurring after January 10, 1965" (Br. in Opp. 16), the critical statute of limitations date, which AMF alleges are examples of continuing conspiratorial conduct aimed at excluding it from the market for exhaust control devices. These overt acts include an acknowledged refusal to deal by Ford in April 1965, respondents' pricing of the air injection system at below cost so that it could meet the price of AMF's Smog Burner and achieve certification, and the "joint development of an air pump in 1965." (Br. in Opp. 21-22) Consistent with the erroneous holding of the court of appeals, however, respondents contend that a cause of action cannot be based on

these acts because they caused AMF "no new injury" not caused by respondents' conspiratorially-announced refusal to deal in 1964 (Br. in Opp. 16).

Respondents' argument only serves to emphasize the conflict between the decision below and those of other courts of appeals. For example, respondents' assertion that the admitted refusal to deal by Ford in 1965 "hardly constitutes an additional rejection of the Smog Burner for a period different from that covered by the 1964 rejection . . ." (Br. in Opp. 22) is squarely at odds with the law of the Fifth and other Circuits. (*See* Pet. 12 n.8.) Contrary to respondents' arguments and the Ninth Circuit's holding in this case, the Fifth Circuit has specifically held that "reiteration of defendants' refusal to deal would have constituted an 'act' within the meaning of *Zenith* and . . . [thus given] 'rise to an antitrust cause of action.' " *Imperial Point Collonades Condominium* v. *Mangurian,* 549 F.2d 1029, 1035 (5th Cir. 1977), *cert. denied,* 434 U.S. 859 (1978).[1] This is because AMF's exclusion from the

[1] Not surprisingly, respondents cite Garelick v. Goerlich's Inc., 323 F.2d 854 (6th Cir. 1963) in support of their position that their 1964 refusals can, as a matter of law, be considered final and irrevocable and that any reiteration of these refusals is not an act for which damages lie under the antitrust laws (Br. in Opp. 20). *Garelick* was also cited by respondents in the court of appeals, and the Ninth Circuit's opinion in this case is in accord with that decision. In *Garelick,* plaintiff (distributor of defendant's products) was notified more than four years prior to bringing suit, allegedly in violation of the antitrust laws, that defendant would cease doing business with it. Plaintiff, however, had at two separate occasions within the four years preceding suit requested to defendant and defendant's salesmen to be reinstated. In an analysis similar to that of the court of appeals in this case, the Sixth Circuit held that plaintiffs "were not in any way injured or damaged" by these subsequent overt acts since they "were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants" (323 F.2d at 856).

Garelick was specifically cited and rejected by the Fifth Circuit in Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 125 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976). The *Poster Exchange* court read this Court's decision in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) as "lay[ing] to rest the theory that . . . suit upon a continued antitrust violation must be prosecuted within four years from the first act of illegality . . ." as well as "eschewing the requirement of acts different in kind to set up a later accruing cause of action." (517 F.2d at 126-27)

market as a result of respondents' 1964 refusals "while perhaps unequivocal, was not of necessity permanent . . . ." *Poster Exchange, Inc.* v. *National Screen Service Corp.,* 517 F.2d 117, 127 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976). Respondents need not have continued to adhere to the conspiracy in 1965, which resulted in AMF's continued injury. Rather, "defendants could have quit causing the injury at any time by agreeing to deal with plaintiff . . . ." *Mangurian,* 549 F.2d at 1035. Ford was given this choice in April of 1965, at a time when it was having severe problems with its own air injection system. Nevertheless, Ford adhered to the conspiracy.

Moreover, in the instant case, the "several incidents" which occurred in 1965 consisted of more than mere reiterations of respondents' 1964 refusals. Respondents' conspiratorial "episodes" in 1965 injured AMF by perpetuating its exclusion from the market and by creating added barriers to market entry. Furthermore, this continued conspiratorial conduct was essential for the conspiracy's success. For example, respondents consistently justified their lack of interest in outside devices by representing to the MVPCB that "the price to the consumer" of their own air injection system,

once developed, would be less than that of the certified devices. (R.5259) These representations forced respondents to beat the price to the consumer of the AMF Smog Burner, which respondents recognized, in July of 1965, was "the lowest priced device already certified" (R.5394). Failure in this regard would have resulted in respondents "not receiv[ing] certification in July [1965]" because "the Board cannot certify our system until a maximum selling price has been established." (*Id.*)[2] Therefore, in July of 1965 respondents, pursuant to the conspiracy, priced air injection without regard to cost, encountering staggering losses in the process. Respondents do not deny this critical factor.

Thus, the record clearly and indisputably demonstrates that rather than being "the least of their worries at that time" (Br. in Opp. 22), the potential competition of the economically priced and "certified . . . AMF afterburner" (R.5394) was, in 1965, the last major barrier to the success of the conspiracy. Nevertheless, the court of appeals has immunized unlawful acts, which occurred within the statutory period, by reasoning that these conceded post-limitations "episodes" were the "unabated inertial consequences" of respondents' "permanent" 1964 refusals to deal (App. 11a *quoting Poster Exchange,* 517 F.2d at 128). This analysis, which not even respondents seriously attempt to defend, is incorrect. The law pertaining to the application of the statute of limitations in cases of continuing

[2] Board regulations prohibited any "undue cost burden to the motorist" (MVPCB Regulations, Part 5, § A). Thus, had the announced price of air injection reflected its true cost, it is doubtful the device would have been approved and the market would have been opened to AMF.

antitrust conspiracies carried a degree of ambiguity before the decision below was rendered. Now, as a result of that decision, one district court already has relied upon the Ninth Circuit's erroneous ruling and stated that post-limitations acts which are essentially the same as pre-limitations conduct cannot provide the basis for an antitrust cause of action. *Woodbridge Plastics, Inc.* v. *Borden, Inc.,* No. 78-5709 (S.D.N.Y. July 2, 1979).[3] This Court should grant the petition and reverse lest the opinion below introduce further uncertainty and conflict on this important subject.

On the issue of whether AMF's damages were ascertainable in 1964 so that a cause of action accrued to AMF at that time, the Brief in Opposition serves to highlight the misapplication by the court of appeals in this case of the rule in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321 (1971). Respondents are forced to recognize at least that under cases in the Second and Third Circuits, fundamental market contingencies resulting "from uncertainty as to the future actions of others" render damages speculative and unprovable, and thus prevent a cause of action from accruing. (Br. in Opp. 28) They argue, however, that

[3] The district court in *Woodbridge Plastics* characterized the holding in the present case as follows:

> Each of the defendants had announced their intention to refrain from . . . purchase [of the AMF Smog Burner] at a meeting in 1964, more than four years prior to the commencement of suit. Their only actions within the four-year period were to adhere to this position and reject renewed requests by plaintiff to sell its product. The Court of Appeals affirmed the dismissal of the complaint as time-barred, finding any injury to plaintiff to have been attributable to the final denials in 1964. The Court characterized the later, reiterated rejections as nothing more than the " 'unabated inertial consequences of some prelimitations action.' " (Slip op. at 6; citations omitted.)

the facts in this case incontrovertibly demonstrate that respondents *themselves* had full control over whether AMF could market its device in California. (*Id.* at 28-29)

Nothing could be further from the truth. Whether AMF would ultimately suffer complete, partial, or no exclusion from the state-mandated market for exhaust control devices as a result of respondents' 1964 announcements was, in 1964, completely beyond the parties' control.[4] Prior to January 10, 1965, respondents' own systems were at a rudimentary stage of development, and certification testing of air injection had not even begun. Respondents proceeded to have serious difficulties with air injection throughout the first half of 1965. Whether certification would be obtained, and if so, on what models, was uncertain until the very end (*e.g.*, R.5749-72; R.5776-77) and rested in the judgment, not of respondents, but of the State of California. Indeed, respondents themselves recognized this as evidenced by their concern that the Board might withdraw certification if "the device in the hands of the public was not functioning properly." (R.5797).

Under these circumstances, no jury could have speculated in 1964 whether respondents would eventually be certified.[5] If respondents had failed to achieve certification, it is almost certain that AMF, with the most effective and most economical device,[6] would have made at least some sales, either to the respondents themselves or, by force of state law, to others for in-state installation. (See Pet. 18).[7] Thus, the present case falls squarely within the rule in *Zenith,* and no cause of action accrued until respondents' certification in mid-1965. The misreading of the decision in *Zenith* by the Ninth Circuit, which conflicts with what respondents concede is the way the rule has been applied in the Second and Third Circuits, requires review by this Court.

[4] Respondents' citation of counsel for AMF's remarks concerning AMF's damages in this case, made at the January 19, 1976 hearing in the district court, is both irrelevant and misleading. (Br. in Opp. 26) These comments concerned AMF's provable damages *at this time,* and have nothing to do with the ascertainability of AMF's damages prior to January 10, 1965.

[5] Despite respondents' continued arguments to the contrary, there is no comparison between the arduous procedures for initial certification that AMF had passed prior to June of 1964, which involved testing on a fleet of 30 used cars representative of the entire vehicle population of the state (R.4150-52), and final certification for production, which merely involved a derivative, not *de novo,* staff determination "that the [modified device] . . . falls within the scope of the original certification." (MVPCB Regulation Part 7 at 2).

Moreover, Board Regulations did not contemplate certification of the Smog Burner for production until after AMF established commercial relationships for its sale and the identity of the models on which it would be installed. (*Id.* at 2-3) Due to the comparability, in design and performance, of the certification prototype and production model (*e.g.*, R.6040, R.6042, R.6044, R.6050, R.6051, R.6141, R.6144, R.6148, R.6184, R.6194-95), final Board approval of the AMF production unit, if defendants purchased it, was assured. Indeed, even the district court acknowledged that "nobody questions the ability of AMF to do the hardware" (Tr. of Proceedings, 1/19/76 at 58).

[6] *See e.g.*, R.6050; R.6076; R.6077-78; R.6130-31; R.4145-46; R.6145-46; R.6147.

[7] Defendants' repeated reference to the "decertification" of AMF's device in September of 1965 is irrelevant to the issues before this Court and was not a basis for the decision in the court of appeals. Certification was suspended on September 15, 1965 for devices "*not now in production*" (MVPCB Resolution 65-26, R. 5845) and would not have applied to the Smog Burner if any defendant had previously elected to use it. Additionally, certification for all systems was "for the 1966 model year only" and recertification for 1967 was considered "only a technicality" (R. 5846-48).

Finally, the bulk of respondents' 30-page Brief in Opposition does nothing more than discuss contested factual disputes between the parties, such as AMF's intention, preparedness, and ability to market its certified pollution-control device in 1965, and respondents' motives when they engaged in the various "episodes" aimed at excluding AMF from the market after the critical statute of limitations date. Indeed, the Brief in Opposition resembles more a brief in support of a jury verdict than one defending summary judgment. As such, it confirms the serious abuse of discretion committed by the court below, and accordingly, the need for this Court to exercise its supervisory power to correct this error.

Assuming a conspiracy in 1964 to exclude AMF from the market for exhaust-control devices, respondents' one-sided and self-serving interpretations of the events of 1965 can be given no weight on summary judgment. The record contains abundant evidence from which a jury could find that AMF was not only capable of entering the market in 1965, but was actively attempting to market its device, by among other things, calling on Ford and International Harvester and quoting a firm production price. (See Pet. 8.) Further, the record also contains abundant evidence from which a jury could find that the AMF Smog Burner was the most effective and economical device available in 1965. Finally, the fact that many of respondents' actions, such as their predatory below-cost pricing in July of 1965, were specifically aimed at the AMF Smog Burner speaks strongly of the fact that the Smog Burner project was very much alive and that further action was needed to assure AMF's market exclusion and the success of the conspiracy.

In short, the Brief in Opposition stands as strong emphasis of the serious errors committed below and the need for review by this Court. This Court should grant the petition and make it clear that the statute of limitations cannot be employed, as here, to immunize repetition or continuation of antitrust violations. The ruling below extends the statute far beyond its purpose and stands as a barrier to enforcement of private rights through private actions under the antitrust laws. *Poster Exchange, Inc.*, 517 F.2d at 127-28.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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